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Premarital Agreements and Choice of Law: “One, Two, Three, Baby, You and Me”*

Julia Halloran McLaughlin**

I. INTRODUCTION

Would a practitioner be foolish to assure a client that a premarital agreement drafted and executed in one jurisdiction will be enforceable, perhaps years later, in another jurisdiction?¹ Family law lawyers, clients and judges regularly encounter issues related to premarital agreement validity, enforceability, and construction across state lines.² Most practitioners, an-

* The Jackson 5 recorded the song “ABC” in 1970. “ABC” was written and produced by The Corporation: Barry Gordy, Jr., Freddie Perren, Alphonso Mizell and Deke Richards. THE JACKSON FIVE, *ABC*, on ABC (Motown Records 1970). I have used a dance metaphor in parts of this paper to identify the steps in choice analysis, to critique the steps as performed by courts and to propose a unique and legally appealing variation of the choice steps with the hope that this visual description of choice rules will assist the reader in grasping the problem and appreciating the proposed resolution.

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1. In *Forrester v. Graham*, No. 199330, 1998 WL 1989805 (Mich. Ct. App. Sept. 25, 1998), a client unsuccessfully sued his attorney for malpractice on the basis that the attorney failed to protect his property from claim upon divorce. The client asserted that he reasonably relied upon the Illinois choice of law provision in his Illinois premarital agreement to protect his property from spousal claim under all circumstances, even upon his relocation to Michigan and subsequent divorce there. *Id.* at *1. Although the appellate court deemed the malpractice claim frivolous and dismissed it, the case highlights the malpractice trap that lawyers drafting premarital agreements face given the mobility of clients and differing premarital agreement rules across state lines. *Id.* at *2.

2. A contract is valid if it “is fully operative in accordance with the parties’ intent.” BLACK’S LAW DICTIONARY 349 (8th ed. 2004). A contract may be valid, but unenforceable due to a “technical defect.” *Id.* Construction is “the act or process of interpreting or explaining the sense or intention of a writing.” *Id.* at 332. Each state has its own statutory or common law rules related to validity, enforceability and con-

ticipating these issues, include a choice of law provision in every agreement.³ This response, however, is no panacea given questions surrounding the validity, enforceability and scope of such clauses.

In the case of *Bonds v. Bonds*,⁴ the California Court of Appeals faced similar questions. The case turned upon the validity of a premarital agreement executed by Barry Bonds, the Baseball Hall of Fame hopeful⁵, and his Swedish girlfriend named Sun.⁶ After a three-month romance, Barry and Sun became engaged to marry in November of 1987. One day before the parties' were to depart for their Vegas wedding, the parties met at Barry's attorney's office to sign a premarital agreement.⁷ At the time of execution, Sun was unemployed, unrepresented, and unclear about the purpose of the agreement.⁸ The agreement contained a complete waiver of property and support rights.⁹ Sun testified that her English language skills were limited at the time; however, she did not disclose her confusion "[o]ut of pride."¹⁰ At the time the agreement was executed in 1988, Barry, a resident of Arizona, had a contract to play for the Pittsburgh Pirates at an annual salary of \$106,000.¹¹ Six years later, at the time of divorce, Barry and Sun were residents of California and Barry was playing for the San Francisco Giants.¹² Sun, still unemployed, was the stay-at-home mom of two children ages 3 and 4 at the time of the divorce. In contrast, Barry was earning approximately \$8,000,000 per year as a major league all-star player.¹³ Following the parties' separation, Barry filed

struction. Thus, choice of law provisions limited to construction arguably embrace only matters of interpretation, excluding matters of validity and enforcement which are determined according to principles of sovereignty and public policy according to forum law.

3. Dennis I. Belcher and Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 28 (2002) (urging attorneys to "understand[] the applicable state statutory law and case law on premarital agreements."). This presents a daunting challenge, given the uncertainty of the jurisdiction in which divorce or death will occur in the future.

4. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783 (Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

5. As of early June, the San Francisco Giants' Official Website reported Barry Bonds' home run total to be at 746, just nine runs shy of Hank Aaron's all-time home run record of 755. See The Official Site of the San Francisco Giants: Team: Player Information, http://sanfrancisco.giants.mlb.com/team/player.jsp?player_id=111188 (last visited June 11, 2007).

6. *Bonds*, 83 Cal. Rptr. 2d at 787.

7. *Id.* at 788.

8. *Bonds v. Bonds (In re Marriage of Bonds)*, 5 P.3d 815, 817-18 (Cal. 2000).

9. *Bonds*, 83 Cal. Rptr. 2d at 789.

10. *Bonds*, 5 P.3d at 818.

11. *Bonds*, 83 Cal. Rptr. 2d at 787.

12. *Id.* at 789.

13. *Id.*

for divorce in 1994 and raised the premarital agreement as a defense to Sun's claim for support and determination of property rights.¹⁴

In *Bonds*, the California Court of Appeals expressly addressed whether an ambiguous Arizona choice of law provision would be enforced by a California court.¹⁵ The court construed the choice provision narrowly to apply only to issues of contractual construction and invalidated the agreement.¹⁶ On appeal, the California Supreme Court reversed, not on the choice of law issue, but on the court's application of the law. The California Supreme Court reinstated the trial court opinion upholding the validity of the agreement in all respects, except as to the waiver of support which was deemed to be invalid as against California public policy.¹⁷

The *Bonds* case illustrates one jurisdiction's approach to premarital agreement questions related to construction, validity and enforcement. Do the answers to these questions turn on individual contract rights and expectations or on the law and policy of the most interested jurisdiction? The *Bonds*¹⁸ approach, elevating state interests above party autonomy, is by no means universally employed. In fact, there is little uniformity in judicial approach across state lines. This uncertainty and the potential for inconsistent results is the focus of this article.

The tension between the private individual's right to contract and the state's goal to further the public policy embodied in its divorce laws creates complex questions surrounding the portability of premarital agreements across state lines. Because each state has unique laws relating to marital rights in the event of divorce and the premarital waiver of them, practitioners, courts and scholars struggle with premarital agreement validity, enforceability and implementation.¹⁹ The struggle is due, in part, to the absence of a uniform analytical approach to conflict of law issues in relationship to premarital agreements. This article advocates a uniform approach embracing one standard to determine questions of validity, enforceability and construction of premarital agreements.

In support of the call for a uniform approach, this article reviews the tangled relationship between general conflict of law theory and premarital agreement conflict of law precedent. Although the Uniform Premarital

14. *Id.*

15. *Id.* at 790. Kessler reports, "No state has been found which will enforce a marital agreement (regardless of the choice of law expressed) when the forum state finds the agreement contrary to its fundamental public policy." Joan F. Kessler, *Can You Choose the Law to Govern Your Marital Agreement?*, 8 J. AM. ACAD. MATRIMONIAL LAW. 107, 110-11 (1992).

16. *Bonds*, 83 Cal. Rptr. 2d at 791, 815.

17. *Bonds*, 5 P.3d at 838.

18. For a detailed discussion of the *Bonds* case, see *infra* Part V.B.1.

19. In premarital agreement disputes, the conflict typically involves whether to apply the chosen law, usually the law of the place of execution, or the forum law, usually the law of the last marital domicile.

Agreement Act²⁰ (hereinafter “UPAA”) contains an express choice of law provision permitting parties to choose the law to govern matters of contractual construction, the model clause is silent as to matters of validity and enforceability.²¹ Some courts construe the UPAA choice provision narrowly and apply it only to construction disputes.²² Other courts construe it broadly and apply it to questions of validity, enforceability and construction.²³ Given the existing confusion, a uniform premarital agreement choice of law analysis is needed. The problem is exacerbated by the mobility of the U.S. population because migration across state lines after the parties marry creates a potential conflict of laws issue as to the validity and enforceability of their premarital agreement.²⁴

Part II of this article presents an overview of premarital agreement rules related to procedural and substantive fairness. Part III examines the relationship between the Restatement (First) of Conflict of Laws (hereinafter Restatement (First)) and the Restatement (Second) of Conflict of Laws (hereinafter Restatement (Second)), with a specific focus on the ability of parties to contractually predetermine controlling law in relationship to marital rights and obligations before they marry. Part IV analyzes the choice of law provision in the UPAA. Part V synthesizes the existing judicial treatment of choice of law provisions in premarital agreements in jurisdictions applying the Restatement (First), Restatement (Second), and the other varying conflict approaches. Part VI explores case law from a variety of jurisdictions addressing particularly vexing premarital agreement construction and interpretation questions. Finally, Part VII proposes a uniform framework to assist parties, attorneys and courts in analyzing choice of law questions in the context of premarital agreements.

This article argues that when a forum court exercises jurisdiction over spouses continuing to reside in the last marital domicile, courts should typically apply forum law, which is the law of the jurisdiction with the materially greatest interest, without regard to the chosen law. However, if the economically dependent spouse has relocated to a different state at the time the dissolution action is initiated, the forum court should apply the law of the domicile of the economically dependent spouse to decide questions of validity and

20. UNIF. PREMARITAL AGREEMENT ACT (2006).

21. *Id.* § 3(a)(7).

22. *See, e.g., Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Reprtr. 2d 783, 791 (Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

23. *See, e.g., Elgar v. Elgar*, 679 A.2d 937, 941 (Conn. 1996).

24. In 2002-2003, the most recent year for which a report is available, the U.S. Census Bureau reports that 40.1 million U.S. residents moved. Of this group, 19%, or approximately 6.4 million people, moved across state lines. JASON P. SCHACHTER, U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY: 2002 to 2003, 2 (2004), *available at* <http://www.census.gov/prod/2004pubs/p20-549.pdf>.

construction, subject always to the forum's fundamental public policy.²⁵ Thus, in any case in which a premarital agreement contains a choice of law provision identifying the law of a jurisdiction other than the law of the domicile of the economically dependent spouse, the provision has lost its legitimacy and must concede supremacy to the law of the jurisdiction with the materially greater interest, the domicile of the economically dependent spouse.

II. PROCEDURAL AND SUBSTANTIVE FAIRNESS PREREQUISITES

Premarital agreement law reveals tension between the interests of the individual and the state. Lawmakers seek to balance the individual's freedom to contract against the state's goal to achieve economic fairness between divorcing spouses. At a minimum, every state requires some degree of financial disclosure to secure the validity of the premarital agreement and compliance with traditional contract rules to deter fraud, duress and mistake.²⁶ Regulations dealing with the circumstances surrounding the execution of a premarital agreement are often referred to as procedural fairness requirements, while rules invalidating agreements based on content are referred to as substantive fairness requirements.²⁷ While all states impose procedural fairness standards upon premarital agreements,²⁸ a majority of states also impose some substantive fairness standards. These standards differ from jurisdiction to jurisdiction. The most common substantive fairness rule imposes minimum fairness requirements in relationship to spousal support and alimony provisions;²⁹ however, only a few states impose a substantive fairness re-

25. This recommendation is based upon the principles that validity should be determined according to the law of the jurisdiction with a materially greater interest in the outcome, while enforceability decisions should be made according to the fundamental public policy of the forum. *See infra* Part VII.A.

26. Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 578-83 (1995).

27. Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752 (1982) (citing Arthur Allen Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485, 486-87 (1967)) (defining "procedural unconscionability as fault or unfairness in the bargaining process [and] substantive unconscionability as fault or unfairness in the bargaining outcome -- that is, unfairness of terms"). Procedural fairness concerns are embodied in the validity requirements, including financial disclosure, the right to independent representation, and the applicability of standard contract defenses. UNIF. PREMARITAL AGREEMENT ACT § 6(a) (2006). Substantive fairness concerns are embodied in the provision permitting courts to order support if enforcing the provisions related to support would render the recipient a ward of the state. *Id.* § 6(b).

28. Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460, 499-506 (2003).

29. UNIF. PREMARITAL AGREEMENT ACT § 1 (identifying 26 jurisdictions that have adopted the act). Some states, including California, Florida and South Dakota

quirement in relationship to property waivers.³⁰ For example, the Kentucky Supreme Court recently affirmed a trial court decision setting aside a spousal support waiver in a premarital agreement. Although valid under Kentucky law when entered, the premarital waiver of spousal support was unenforceable at the time of divorce because changed circumstances rendered the waiver unfair and unreasonable.³¹

The distinction between procedural and substantive premarital agreement protections³² becomes important to later choice of law analysis because both types of protections arguably further a jurisdiction's fundamental public policy interests. The unique combination of procedural and substantive fairness protections comprising premarital agreement law reflects each state's

impose even greater restrictions on support waivers prior to divorce than the restrictions set forth in the UPAA. *See infra* notes 130-35 and accompanying text.

30. McLaughlin, *supra* note 28, at 504-06. Traditional contract procedural protections alone are inadequate because the "choice" often presented to a prospective spouse, either sign the agreement as drafted or cancel the wedding, presents a dilemma: sign an unfair agreement or forgo a married future with this trusted individual. Additionally, the decision to postpone marriage does not have the same impact on men as it does on women. A woman is subject to the added pressure of marrying and mating within the optimum time frame for childbearing. A man's decision to postpone marriage is not biologically limited in the same manner, although research may prove that younger men make healthier sperm. *See, e.g.,* Ashok Agarwal & Shyam S.R. Allamaneni, *Sperm DNA Damage Assessment: A Test Whose Time Has Come*, 84 FERTILITY AND STERILITY 850, 850 (2005). Arguably, the non-choice of executing a premarital agreement waiving rights further fixes the woman's subordinate position in the marital relationship, already compromised by lower pay, fewer advancement opportunities in the work place, and a greater responsibility for the unpaid labor associated with home making and child rearing. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 8-14 (2d ed. 2003).

31. *Lane v. Lane*, 202 S.W.3d 577, 580 (Ky. 2006) (changed circumstances rendering waiver unconscionable included "exponential" change in disparity of income, wife's withdrawal from workplace to raise children, and the affluent lifestyle of the parties during the 9 year marriage).

32. This distinction between procedural and substantive protections is discussed in the introductory note to Chapter Six of Restatement (Second) of Conflict of Laws:

Commonly, it is said that the forum will apply its own local law to matters of procedure and the otherwise applicable law to matters of substance. The Constitution of the United States imposes some limitations upon the power of a State to characterize an issue as procedural and then to determine the issue in accordance with its own local law.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, introductory note (2006) (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) and *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)).

view of the appropriate balance between individual autonomy and state oversight of premarital agreements.³³

The unique blend of procedural and substantive protections renders premarital agreements *sui generis* because these contracts are “intrinsically different from other contracts.”³⁴ Typically, they abrogate the legal duties between spouses, a matter of significant public concern. They are particularly unique because of what psychologists refer to as the “limits of cognition,” characterized by a couple’s “undu[e] optimism about the fate of their marriage”³⁵ and “the human tendency to treat low probabilities as zero probabilities, the excessive discounting of future benefits, and the inclination to overweigh the importance of the immediate and certain consequences of agreement – the marriage – as against its contingent and future consequences.”³⁶ Given the “special requirements” to enforce premarital agreements associated with substantive and procedural fairness, the validity and scope of choice of law provisions in premarital agreements becomes problematic. The conflict between the individual and the state becomes particularly tense when a choice of law provision renders a foreign premarital agreement valid, furthering individual autonomy, while the agreement violates the substantive fairness rules that would otherwise apply, absent a valid choice provision, thus raising state sovereignty concerns. One way to decide whether a premarital agreement violates public policy is to compare the economic rights and obligations of the individuals under the agreement to the rights each would enjoy under the controlling law absent an agreement.³⁷

33. This recommendation is based upon the principles that validity should be determined according to the law of the jurisdiction with a materially greater interest in the outcome, while enforceability decisions should be made according to the fundamental public policy of the forum. *See infra* Part VII.A.

34. In response to the redistribution of property without regard to title under marital property regimes, premarital agreements evolved as a means of reasserting the right to privately determine property rights free from state interference upon divorce. *See* Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J. L. & FAM. STUD. 1, 25-26 (2003) (identifying the distinguishing characteristics of a premarital agreement to include subject matter, relationship, future performance of indeterminate length and the asymmetrical monetary and non-monetary contributions peaking early for the wife in terms of childbearing and later for the husband in terms of husband’s earning potential).

35. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254 (1995). Eisenberg argues that parties involved in negotiating a premarital agreement operate within a haze of limited cognition. They are likely to be “unduly optimistic about the fate of their marriage;” therefore, they heavily discount the possibility of divorce and undervalue the divorce statistics. *Id.* at 254.

36. A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05 (2002).

37. *Id.* For example, any downward deviation in excess of 20% could be presumptively unenforceable.

In such an example when legitimate interests diverge, when, if ever, should the state's interest trump the individual's right to contract? One argument favoring the state's interests over those of the individual is that marital economic rights arise at the time of separation and divorce when the marital estate is identified, valued and divided between the parties based on the surrounding circumstances and in accord with statutory guidelines.³⁸ Given this argument, serious questions arise surrounding the sufficiency of the substantive and procedural protections afforded to parties to premarital agreements who waive future rights that cannot be identified or valued until the parties' marriage ends in divorce.³⁹ Arguably, the same policy goals underlying the divorce code of the applicable law should be applied to decide issues related to premarital agreements advanced in divorce actions.

Absent a uniform analytical framework, the following questions must be examined to resolve a premarital agreement controversy:

1. What law applies to determine the validity of the agreement?
2. What law applies to determine the enforceability of the agreement?
3. What law applies to determine construction of disputed terms within the agreement?

Currently, each state answers these questions according to its own choice of law rules and precedent, creating widely disparate results.

III. CHOICE OF LAW CHOREOGRAPHERS: BEALE, CURRIE, BAXTER AND LEFLAR

In order to understand choice of law theory in relationship to premarital agreements, it is helpful to understand the general choice of law approaches at work in the United States. Most states follow the Restatement (Second),⁴⁰ while the balance embrace either the Restatement (First)⁴¹ or other modern

38. See McLaughlin, *supra* note 28, at 472.

39. See *id.* at 472-73.

40. EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS 37 (2001). See also Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L. J. 1041, 1172 (1987).

41. The most recent survey demonstrates that eleven states continue to adhere to the Restatement (First). See Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 944 (2004) [hereinafter Symeonides, 2004 Survey]; Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 596 (2005) [hereinafter Symeonides, 2005 Survey] (finding no change to the 2004 chart). These states include: Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Rhode Island, South Carolina, Tennessee, Virginia, and Wyoming. *Id.* Two of these states (Georgia and South Carolina) employ a substantive fairness analysis to determine the enforceability of premarital agreements. See McLaughlin, *supra* note 28, at

approaches such as The Better Law Approach or the Comparative Impairment Approach.⁴² This section traces the evolution of the Restatement (First), surveys its critics, and ends with a summary of the Restatement (Second), a hybrid approach, which combines elements from a variety of different theories.

A. Beale and the Restatement (First)

Joseph Beale, who wrote for the Advanced Law Institute, authored the Restatement (First).⁴³ He organized the contract choice rules around the concept of vested rights⁴⁴ to determine controlling law when the parties disagreed. Thus, under the Restatement (First), if a contract cause of action vested under the laws of a foreign jurisdiction, then the law of that jurisdiction controlled the outcome of the case, without regard to the forum in which the action was ultimately filed.⁴⁵ Turning upon “the place where the last act occurred that was necessary to complete the cause of action,”⁴⁶ Beale’s approach is also referred to as the *lex loci* approach.⁴⁷ Beale expressly rejected the idea of permitting parties to contractually designate the controlling law because such a provision impinged on the exclusive power of elected legisla-

505-06. Given the confluence of these two factors, that is a Restatement (First) jurisdiction employing a substantive fairness test, premarital agreements in Georgia and South Carolina might be particularly difficult to enforce based on public policy grounds. Even the Restatement (First) jurisdictions recognize party autonomy and routinely enforce choice of law clauses. William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1213 (1997).

42. According to Symeonides, in 2004, twenty-four states followed the Restatement (Second) approach for contract questions and seventeen states followed a significant contacts, interest analysis, better law, or combined modern approach. Symeonides, *2004 Survey*, *supra* note 41, at 944.

43. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

44. The concept of vesting in premarital contracts differs from vesting of other contracts because the property rights waived before acquisition, mature not upon marriage, but upon separation and divorce.

45. Richman & Riley, *supra* note 41, at 1197 (“The role of the forum court in the choice-of-law process was merely to enforce the right that had vested in the foreign territory according to the foreign law.”).

46. LEA BRILMAYER, *CONFLICT OF LAWS* 23 (1995). For example, under the Restatement (First), sections 323 and 325, the last act necessary for a contract right to vest was acceptance of the contract. *Id.* at 23 n.45. Thus, the law of the forum of acceptance controls. *Id.*

47. *Id.* The territorial rule for contract disputes is referred to as *lex loci contractus* or simply *lex loci*. BLACK’S LAW DICTIONARY 930 (8th ed. 2004).

tors to make law and policy in a given jurisdiction.⁴⁸ Under Beale's approach, one factor determined the applicable law in a contract case: the last act required to create the vested right.⁴⁹ Typically, the last act required to create the contract rights between the parties was the execution of the agreement.

The *lex loci* approach is rendered less helpful in relationship to premarital agreements because rights are typically limited rather than expanded. Rather than creating a mutually advantageous economic exchange of goods or services for a negotiated price, premarital agreements seek a release of rights more akin to a waiver. Thus, premarital agreements are distinguishable from traditional contracts. Arguably divorce is the last act necessary to create, or more likely limit, rights according to premarital agreements because marital property and support rights cannot be determined until the time of divorce. Therefore, the law of the last marital domicile should typically apply to determine all questions related to premarital agreement litigation.

In search of predictability, certainty and judicial convenience, eleven states continue to adhere to the Restatement (First) employing the *lex loci* approach to determine the law applicable to a contract.⁵⁰ This Bealean approach relies upon principles of Full Faith and Credit to require the application of the law of the state in which the rights were created.⁵¹ Thus, courts will enforce rights created in other jurisdictions because "such rights and obligations could be carried from state to state, like any other judgment or intangible property interest."⁵² Each state expects reciprocity in return. Beale's approach depended upon the assumption that rights came into existence upon execution of a contract and, by enforcing contracts, courts merely enforced pre-existing rights.⁵³

While Beale created a sophisticated and unified framework to analyze conflict of laws, critics describe the Restatement (First) as "cumbersome and dogmatic."⁵⁴ With its emphasis on the *lex loci*⁵⁵ to decide contractual choice of law issues, the Restatement (First) afforded a set of certain rules, even if the results were sometimes illogical. For example, the place of the last act to create a contract is not necessarily a jurisdiction with any connection to the

48. See JOSEPH H. BEALE, *THE CONFLICT OF LAWS* 1079-80 (1935). Beale considered and rejected party designation of controlling law by noting: "The fundamental objection to this in point of theory is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract." *Id.*

49. FRUEHWALD, *supra* note 40, at 12.

50. Symeonides, *2005 Survey*, *supra* note 41, at 596.

51. FRUEHWALD, *supra* note 40, at 20.

52. *Id.* at 22.

53. *Id.* at 38.

54. See BRILMAYER, *supra* note 46, at 4.

55. Richman & Riley, *supra* note 41, at 1206.

contract terms of performance or to either party to the contract.⁵⁶ Nevertheless, under Beale's approach, the law of the jurisdiction of the last act applied. In some instances, this resulted in the application of the law and public policy of an entirely disinterested jurisdiction, while undermining that of the forum or other interested jurisdictions.⁵⁷ The application of the law of a disinterested jurisdiction to a dispute achieves no valid policy interests and undermines the role of the court as the arbiter of a fair and just result.

Compelling justifications for the *lex loci* approach include "simplicity, predictability, and forum neutrality."⁵⁸ However, the goals of inter-state certainty and predictability remained elusive because even the definition of the "last act" differs between jurisdictions. For example, Florida courts apply the law of the place of performance, rather than the last act necessary to create the contract. Thus, even *lex loci* jurisdictions employ different rules. This creates uncertainty and judicial confusion within one conflict approach embraced for its certainty.⁵⁹

In addition to the elusory goals of certainty and easy application, another weakness of the Bealean approach is that while it distinguishes between procedural legal questions and substantive legal questions, applying forum law to the former and *lex loci* law to the latter, it provides little guidance to distinguish between the two. For example, the Restatement (First) fails to instruct parties, practitioners and courts as to whether questions related to contract validity, enforceability and construction are procedural or substantive.⁶⁰ One inference might be that matters related to procedural fairness and validity should be determined according to forum law, while matters relating to the substantive fairness of the agreement should be determined according to the law of the *lex loci* and deemed matters within the parties' control. This analysis affords to the forum some degree of control regarding the "brand of justice" it delivers to divorcing parties.

To further complicate matters, the Restatement (First) expressly created a public policy exception to the last act rule, by permitting the forum state to apply forum law to prevent the violation of forum public policy.⁶¹ Because it

56. *Id.*

57. *Id.*

58. *Id.* at 1200.

59. *Mazzoni Farms, Inc. v. E.I. DuPont Nemours & Co.*, 761 So. 2d 306 (Fla. 2000).

60. BRILMAYER, *supra* note 46, at 28. Even under the Restatement (First) "place of execution" rule, courts created exceptions to apply place of performance law to issues such as time for performance and sufficiency of delivery. RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 444 (2001).

61. BRILMAYER, *supra* note 46, at 28. Section 612 of the Restatement (First) is entitled, "Action Contrary to Public Policy." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934). It provides: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." *Id.* Comment a characterized the refusal to apply foreign law

is so broadly worded, the public policy exception embodied in the Restatement (First) continues to be the most popular “escape device” to trump the *lex loci* law.⁶² Some scholars have compared Beale’s public policy exception to the Restatement (Second) “significant contacts analysis.”⁶³ Finally, Beale’s theory did not create any way to dispose of problems related to *renvoi*⁶⁴ or to resolve charges of arbitrariness when the *lex loci* law lacked any relationship, other than the last act, to the subject of the litigation.⁶⁵ This critique is particularly relevant in premarital agreement choice of law litigation because the forum is typically the last marital domicile, but not necessarily the place of contracting.

Thus, parties to premarital agreement litigation in a Restatement (First) jurisdiction might predict that: 1) courts will disregard choice of law provisions as outside of the scope of the parties’ authority to contract and 2) courts will apply *lex loci* law unless to do so would violate a fundamental public policy of the forum.⁶⁶ Because the courts enjoy broad discretion in characterizing issues as procedural or substantive and they enjoy flexibility in determining the last act needed for the right to vest triggering the applicable law,⁶⁷ it is difficult to predict applicable law in Restatement (First) jurisdictions. Therefore, the promise of certainty and uniformity under the Restatement (First) remains illusory.

B. Currie, Baxter and Leflar and the Restatement (Second)

This section is subdivided into two parts. The first explores the theories developed by Brainerd Currie, William Baxter and Robert Leflar. The second part tracks the evolution of the Restatement (Second).

as procedural in nature. *Id.* § 612 cmt. a. Comment b adds that a mere difference between the laws will not render the enforcement of the chosen law contrary to forum policy. *Id.* § 612 cmt. b. Examples of actions contrary to public policy were contracts that were illegal gambling contracts either according to forum law or according to the law of the place of execution. *Id.* § 612 cmt. c, illus. 1.

62. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMONIDES, *CONFLICT OF LAWS* 23 (4th ed. 2004).

63. BRILMAYER, *supra* note 46, at 74.

64. *Id.* at 105-09. “Renvoi” is the term used to describe a choice of law problem that occurs when the court applies a foreign choice of law rule that points back to the forum, creating the possibility of a circular argument identifying no substantive law. WEINTRAUB, *supra* note 60, at 29.

65. BRILMAYER, *supra* note 46, at 35-37.

66. See *infra* Part V.A. discussing Restatement (First) jurisdictions’ treatment of premarital agreement choice of law litigation.

67. BRILMAYER, *supra* note 46, at 29

1. Contributions of the Legal Realists

Given the potential weaknesses of the Restatement (First) approach outlined above, “Legal Realists,” including Brainerd Currie,⁶⁸ William Baxter⁶⁹ and Robert Lefflar,⁷⁰ criticized the Restatement (First) for its inflexible *lex loci* approach because the many exceptions, most notably the public policy exception, engulfed the rule. In response to the settled rules of the Restatement (First), Brainerd Currie pioneered the Governmental Interests Analysis, an approach designed to distinguish between true and false conflicts of law and to resolve the true ones.

Currie is credited with identifying the three-prong classification system of conflict cases: 1) true conflict, 2) false conflict, and 3) the unprovided-for case.⁷¹ According to Currie, when a true conflict arises, i.e. one in which more than one state has a legitimate interest in having its law enforced, the forum court is empowered to further forum public policy by applying forum law, as a matter of default.⁷² Under Currie’s approach, the court must first identify the relevant underlying forum policies, through interpretation of applicable statutes.⁷³ Next the court must determine whether the state has an interest in applying its own law, given the policies at issue.⁷⁴ Currie’s approach is characterized as “unilateral” because it recognizes that if more than one state has a legitimate interest in the application of its respective law, forum law applies by presumption.⁷⁵ Thus, a forum applies foreign law only if the forum state lacks any legitimate governmental interest in applying its own law, creating a forum law default rule. Currie’s approach has been criticized

68. Most of Brainerd Currie’s conflict of laws scholarship is collected in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). See also Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

69. William Baxter’s comparative impairment approach is described in William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

70. A summary and refinement of much of Robert Lefflar’s conflict of laws scholarship is collected in ROBERT A. LEFLAR, LUTHER L. MCDUGAL III & ROBERT L. FELIX, *AMERICAN CONFLICTS LAW* (4th ed. 1986).

71. SCOLES ET AL., *supra* note 62, at 28.

72. FRUEHWALD, *supra* note 40, at 24-25. Another scholar, Albert A. Ehrenzweig, divided conflicts into two categories, settled law and unsettled law. His theory applied only absent statutory or common law binding authority. Absent such authority, the proponent of the foreign law is required to establish forum law authorizing the application of foreign law. Absent such proof, forum law applied. See SCOLES ET AL., *supra* note 62, at 38-40. The default return to forum public policy mirrors the Restatement (First) deference to forum public policy.

73. BRILMAYER, *supra* note 46, at 50.

74. *Id.*

75. FRUEHWALD, *supra* note 40, at 25.

as no better than Beale's approach because it "substitutes a personal nexus" approach for the territorial approach advocated by Beale.⁷⁶

Others, most notably, William Baxter, built upon Currie's analysis and proposed a theory of comparative impairment, affording to the court the authority to determine the strength and importance of the policies at issue and which state's policies would be more impaired if its law was not to be applied.⁷⁷ Rather than eschewing the court's authority to weigh competing state interests as Currie did, Baxter would have empowered courts to make a normative decision as to which state could better forgo the furtherance of its applicable policy.⁷⁸

Embracing the Currie idea of identifying true conflicts, Robert Leflar proposed a theory referred to as "The Better Law Approach." He identified five factors to assist courts in arriving at the applicable law and eliminating forum law bias: 1) predictability of results, 2) maintenance of interstate and international order, 3) simplification of the judicial task, 4) advancement of the forum government's interests, and 5) application of the better law approach.⁷⁹ Leflar defined the "better law" to be "the more effective, the more modern, and the more just."⁸⁰

The theories of Baxter and Leflar are subject to the same criticism as were the theories of Beale and Currie: each standard can be molded by courts to reach a variety of different results based upon the weight afforded to the competing factors at issue.⁸¹ The tension between certainty and fairness, akin to the tension between the individual's right to contract and the state's interest in advancing forum public policy, requires flexible choice rules to maintain the legitimacy of the judicial branch of government. Despite the best efforts of scholars to eliminate, or at least neutralize, forum law favoritism, it remains clear that each approach leads "homeward."⁸²

2. Evolution of the Restatement (Second)

Given the competing interests and differing viewpoints, it is not surprising that the Restatement (Second) combined choice of law precepts advanced

76. *Id.* at 26 (quoting FRIEDERICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 135 (1993)).

77. BRILMAYER, *supra* note 46, at 70. See also SCOLES ET AL., *supra* note 62, at 31.

78. BRILMAYER, *supra* note 46, at 70.

79. SCOLES ET AL., *supra* note 62, at 52. Two jurisdictions currently embrace the Leflar approach in contract choice of law disputes: Minnesota and Wisconsin. *Id.* at 53.

80. BRILMAYER, *supra* note 46, at 71.

81. *Id.* at 26.

82. SCOLES ET AL., *supra* note 62, at 106 n.4.

by legal realists, including Beale, Currie, Baxter and Leflar,⁸³ and emerged as a hybrid approach designed to combine conflicting choice of law precepts into a coherent and flexible analytical approach, in contrast to the inflexible rules advanced in the Restatement (First).⁸⁴ The Restatement (Second) employs the most significant relationship analysis.⁸⁵ This approach requires the court to choose applicable law based upon a series of factors designed to identify which state has the most significant interest in the outcome of the litigation.⁸⁶ To achieve this goal, the court conducts a balancing test⁸⁷ related to the relative governmental interests in advancing each state's respective public policies.⁸⁸

The most significant relationship analysis⁸⁹ of the Restatement (Second) embraces an "impressionistic" approach that seeks to balance private contract rights and the public welfare generally.⁹⁰ Over time, many jurisdictions shifted to the Restatement (Second), leaving only eleven Restatement (First) jurisdictions.⁹¹

To guide practitioners and courts in achieving consistent, predictable and fair results, drafters of the Restatement (Second) set forth the following policy goals to assist in applying the rules:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,

83. See generally *id.* at 58-67. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006) (refining the public policy exception pioneered by Beale).

84. SCOLES ET AL., *supra* note 62, at 58-60. According to Symeonides, in 2004, twenty-four jurisdictions adhered to the Restatement (Second) approach. Symeonides, 2004 Survey, *supra* note 41, at 944.

85. SCOLES ET AL., *supra* note 62, at 59.

86. *Id.* at 61-63.

87. LUTHER L. MCDUGAL, ROBERT L. FELIX & RALPH V. WHITTEN, AMERICAN CONFLICTS LAW 340 (5th ed. 2001). Brainerd Currie believed the balancing test provided too much discretion to the forum court and would simply have provided a default rule that if both states had a valid interest, then forum law should prevail. Nevertheless, the ALI adopted a balancing approach informed by Currie's seminal work relating to government interests. *Id.* at 341.

88. *Id.* at 339-40.

89. The most significant relationship test embraces parts of Currie's governmental interests analysis, as well as parts of other theories. Thus, the Restatement (Second) most significant relationship test is distinct from the governmental interest analysis. Moreover, the term policy is distinct from interest in Currie's writings. A policy is determined by examining the legislative intent. Once a policy is discerned, the court connects the specific factors to the state with the policy at issue, to determine whether the state has an interest in having its law applied. BRILMAYER, *supra* note 46, at 50-53.

90. *Id.* at 64.

91. See *supra* note 41.

- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁹²

Thus, agreements lacking choice of law provisions should be enforced according to the law of the jurisdiction with the most significant relationship to the outcome in jurisdictions following the Restatement (Second).

In addition to creating a set of guidelines to follow in resolving conflict questions, the Restatement (Second) also includes a provision devoted to the treatment of a choice of law provision contained in a contract.⁹³ Given the prevalence of choice of law provisions in premarital agreements and the goal of promoting best practices,⁹⁴ the Restatement (Second) provision dealing with choice of law provisions is particularly relevant:

§ 187. Law of the State Chosen by the Parties

- (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue,⁹⁵ unless either:

92. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (2006).

93. SCOLES ET AL., *supra* note 62, at 979-83. Section 187 expressly resolves the question left open under the UPAA: whether the contracting parties may designate the law to determine capacity, formalities and substantial validity.

94. See Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner's Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1 (2002); William Cantwell, *Premarital Contracting: Why And When*, 8 AM. ACAD. MATRIMONIAL LAW. 45, 56-57 (1992); GARY N. SKOLOFF ET AL., DRAFTING PRENUPTIAL AGREEMENTS V-65, V-71-75 (1994).

95. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006). Particular issues which the parties cannot resolve by an explicit provision include: capacity to contract, contract formalities and substantive validity requirements. *Id.* According to section 187, even these matters may be resolved by contract so long as there is a substantial relationship between the chosen law and the parties or the transaction, there is some other reasonable basis supporting the chosen law, the chosen law does not vio-

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 187, would be the state of the applicable law in the absence of an effective choice of law by the parties.⁹⁶

The factors to determine whether a state has a materially greater interest in the outcome of the legal issue presented are set forth in Restatement (Second) section 188 and include the place of contracting, place of negotiating, place of performance, location of the subject matter and the domicile and residence of the parties to the contract.⁹⁷ Certainly, the place of performance, the location of the subject matter and the residence of the parties are all contacts pointing to the law of the last marital domicile if it differs from the law designated by agreement.

The foregoing provisions require a rich and multifaceted analysis of premarital agreement choice of law provisions. In most premarital agreement choice cases, the choice of law provision is very general and provides: "The parties agree that the law of jurisdiction X shall control." The use of such a general provision renders it impossible to determine, from the language of the agreement alone, the intended scope of the chosen law. Although section 187 does not expressly take into account the language of the provision in interpreting its scope and validity, it incorporates the distinction between matters of construction and interpretation and matters related to validity and enforceability.⁹⁸

Under section 187(1), the Restatement recognizes the authority of parties to designate the law to construe and interpret their agreement. Instead of anticipating such potential disputes and addressing each eventuality, designating the applicable law is a shorthand way of spelling out how the parties will deal with questions of intent and ambiguity. The chosen law will be applied to issues the parties could have expressly included in their agreement. Under this provision, the choice provision serves as a short-hand, gap filler provision. Thus, choice of law provisions in premarital agreements dealing with

late a fundamental public policy of a state with a materially greater interest, and the law of that state would otherwise apply. *Id.*

96. *Id.*

97. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (2006).

98. See David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 241, 259 (2004).

disputes regarding construction are enforceable in Restatement (Second) jurisdictions.

Section 187(2) explores the more controversial use of choice of law provisions to identify controlling law as to issues which the parties may not resolve by express provision. The Restatement (Second) identifies two exceptions to this prohibition. Before exploring these exceptions, it is important to identify the issues envisioned by the drafters of this section. The comments suggest that matters related to capacity, form and formation are within the parties' control and are subject to chosen law under section 187(1).⁹⁹ In contrast, matters related to misrepresentation, duress, undue influence and mistake are not typically issues that can be resolved by an explicit provision. Nevertheless, such issues can be decided by chosen law unless one of the two exceptions applies.¹⁰⁰

The first exception invalidates choice of law provisions that lack a substantial relationship or reasonable basis for the choice. Exception (a), relating to minimum contacts, is based upon a constitutional Due Process concern. The controlling standard is set forth in *All State v. Hague*.¹⁰¹ So long as the parties have a reasonable basis upon which to rely in choosing the identified law, the choice of law provision is valid. Given this forgiving standard, the lack of substantial relationship standard is rarely satisfied.¹⁰²

The second exception, embracing a public policy escape device, is more often relevant in premarital agreement litigation. It requires the proponent of the exception to establish that the chosen law violates a fundamental public policy of the jurisdiction of the otherwise applicable law and that the jurisdiction of the otherwise applicable law has a materially greater interest in the application of its own law than does the jurisdiction of the chosen law.¹⁰³

99. SCOLES ET AL., *supra* note 62, at 955-56.

100. This is a very forgiving standard. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (court reviews choice of law to be sure application is neither arbitrary nor fundamentally unfair).

101. *Id.* at 312-13.

102. See *Brenner v. Oppenheimer & Co. Inc.*, 44 P.3d 364, 372 (Kan. 2002) (fairness prong of due process test is satisfied by the existence of one contact to support application of forum law without regard to weightier contacts of other jurisdictions); *Robinson v. Robinson*, 778 So. 2d 1105, 1116 (La. 2001) (brief residence of husband in jurisdiction of chosen law fails the lack of sufficient relationship to the transaction standard); see also Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 500 (1989).

103. See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 372-73 (2003). Ribstein examined 697 cases addressing the validity of choice of law provisions in business contracts. He found an 85% overall enforcement rate, with many more federal cases interpreting these clauses, 529, than state cases, 168. He discovered a significantly lower percentage of non-enforcement in federal cases, 12%, than the 25% non-enforcement rate in state courts. He noted a pattern of non-enforcement in the area of non-competition clauses in which 29 were set aside out of a total of 71 cases. Arguably employment non-compete clauses are

Thus, application of section 187(2)(b), requires a rich and detailed analysis to decide the applicability of chosen law.

Given the limited basis upon which to set aside a choice of law provision, the definition of a fundamental public policy becomes extremely important. A mere difference between the otherwise applicable law and the chosen law is not enough.¹⁰⁴ Courts require the foreign law to “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal,” or “shock our sense of justice.”¹⁰⁵ A fundamental policy must be “substantial.” Such a policy is unlikely to deal with “contract formalities.” On the other hand, forum contract laws dealing with procedural fairness, “designed to protect the person from oppressive use of superior bargaining power,” present examples of substantial fundamental policies that would support application of forum law rather than chosen law according to the drafters.¹⁰⁶ The relevant public policy is often, but not always, that of the forum state. In some cases, the state with the materially greater interest under section 187(2)(b) is not the forum or the jurisdiction of the chosen law, but rather a third interested state, called the *lex causae*.¹⁰⁷

Once the controlling law of the most interested state has been identified, then the court examines the public policy underlying the controlling law to determine whether application of the foreign law undermines forum fundamental public policy.¹⁰⁸ The drafters of the Restatement (Second) struggled

similar to premarital agreements, given the uncertainty of the length of the employment relationship and the uncertain economic status of the parties at the time enforcement is sought. However, non-competition clauses expire after a certain period of time, thus restoring an employee’s full rights. *Id.* at 374-76. Parties to premarital agreements typically enjoy no such automatic restoration of rights, thus inviting careful judicial analysis in choice of law disputes.

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006). Some examples of matters deemed of fundamental public importance include retaining the forum law to decide matters related the enforceability of: covenants not to compete, homestead rights, and indemnification rules. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990) (covenants not to compete); Nicole v. Nicole-Sauri (*In re* Estate of Nicole Santos), 648 So. 2d 277, 282 (Fla. Dist. Ct. App. 1995) (homestead rights); Panatrol Corp. v. Emerson Elec. Co., 163 S.W.3d 182 (Tex. App. 2005) (indemnification rules).

105. SCOLES ET AL., *supra* note 62, at 959.

106. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006).

107. SCOLES ET AL., *supra* note 62, at 960.

108. A simple difference between public policy interests is not enough to trigger the section 187(2)(b) exception. Although not defined in section 187, the writers provide some examples of fundamental public policy, including statutes designed to prevent illegal contracts and statutes designed “to protect one party from ‘the oppressive use of superior bargaining power.’” SCOLES ET AL., *supra* note 62, at 963-64. On the other hand, the violation need not be as strong as that required to refuse to apply foreign law under the *ordre public* exception. *See* RESTATEMENT (SECOND) OF

with a state's sovereign right to refuse to enforce contracts executed in contravention of state-defined contract protections, including voluntariness, just as Beale had. Comment (b) to section 187 expressly provides:

A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as . . . duress, or undue influence or by mistake. Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles.¹⁰⁹

This comment clarifies the drafter's intent to protect the right of the forum to determine "under its own substantive standards" whether the choice of law provision was properly obtained "before allowing such a displacement."¹¹⁰

Confusion has arisen, however, because a separate section of the Restatement (Second) permits parties to choose the law to determine the applicable defenses. Section 201 provides: "The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187-188."¹¹¹ A casual reading of this more specific provision facially supports the assertion that parties to premarital agreements are free to choose the law that will control the validity

CONFLICT OF LAWS § 187(2) cmt. g. (2006). As previously noted, covenants not to compete often contain choice of law provisions and trigger public policy inquiries under section 182(b). *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 621 S.E.2d 352, 354 (S.C. 2005) (non-compete clause in employment agreement identifying New Jersey law as controlling held unenforceable by South Carolina court under forum law); *Crown Castle USA, Inc. v. Howell Eng'g and Surveying, Inc.*, Nos. 2040076 & 2031147, 2005 WL 1994256, at *4 (Ala. Civ. App. Aug. 19, 2005) (non-compete clause in agreement designating North Carolina law as controlling held unenforceable under Alabama law); *but see* *Boss v. Am. Express Fin. Advisors, Inc.*, 15 A.D.3d 306, 308 (N.Y. App. Div. 2005) (difference between Minnesota and New York labor laws does not rise to level of a fundamental public policy, thus choice of law is valid and enforceable); *Three M Enterprises, Inc. v. Texas D.A.R. Enterprises, Inc.*, 368 F. Supp. 2d 450, 457 (D. Md. 2005) (forum choice rules used to determine validity standard).

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (2006).

110. SCOLES ET AL., *supra* note 62, at 955-56.

111. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 (2006). Absent a choice of law provision, the Restatement (Second) section 188(2) provides a list of the relevant connecting factors: place of contracting, place of negotiation, place of performance, location of the subject matter, and domicile of the parties. *Id.* § 188(2). Section 188(3) provides whenever the place of negotiation and performance are the same, the law of that jurisdiction applies. *Id.* § 188(3). Additionally, sections 189-99 provide particularized rules for specific types of agreements. *Id.* §§ 188-99. *See also* SCOLES ET AL., *supra* note 62, at 1005-06.

of their agreement, including the availability of contract defenses.¹¹² However, section 201 expressly references the section 187 requirements that the chosen law bear some rational relationship to the issues to be resolved and not violate the fundamental public policy of the jurisdiction with the materially greater interest in the resolution of the issue.¹¹³

Thus, under the Restatement (Second), a choice of law provision embracing issues beyond construction and interpretation is always subject to review under two legal standards: the chosen law and the law of the jurisdiction that would otherwise apply. A potential conflict arises when these standards differ. Issues related to premarital agreement procedural fairness, as previously discussed,¹¹⁴ constitute matters of fundamental public policy that ought not to be subverted by contract.¹¹⁵ Additionally, legal issues related to the substance of the agreement also impact fundamental public policy under the Restatement (Second). Although the substance of contracts is typically not policed by the courts, absent strict unconscionability or illegality, this is not the case in relationship to premarital agreements that remain subject to substantive fairness safeguards in a majority of jurisdictions with respect to spousal support and alimony and in a minority of jurisdictions with respect to property distribution. Both the substantive and procedural safeguards advance marital dissolution public policy.

Thus, parties to premarital agreement litigation in a Restatement (Second) jurisdiction might predict that the choice of law provision in a premarital agreement will be honored so long as the choice satisfies section 187 as follows:

112. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201.

113. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 (2006).

114. *See supra* Part II.

115. *See, e.g., Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 195 (2d Cir. 1955) (“To permit parties to stipulate the law which should govern the validity of their agreement would afford to them an artificial device for avoiding the policies of the state which would otherwise regulate the permissibility of their agreement. It may also be said that to give effect to the parties’ stipulation would permit them to do a legislative act, for they rather than the governing law would be making their agreement into an enforceable obligation.”). In fact such claims are sometimes deemed to sound in tort, and thus are not controlled by a contract choice of law provision, but rather fall under the tort choice of law provisions. This argument could further complicate the premarital agreement choice of law analysis. *See* PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* § 2:28 (July 2006) (“Even if a court reviewing a fraud claim determines that the gravamen of the complaint is in contract, it is more likely that tort principles will be applied to the fraud allegations . . . in order to determine whether actionable fraud has occurred. . . . Therefore it is necessary to consider the tort choice of law principles provided in each of the Restatements.”). *See, e.g., Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 728 (5th Cir. 2003) (New York choice of law upheld for contract claims but Texas law applied to fraud and misrepresentation claims).

1. The choice of law embraces matters of construction, capacity and form, or
2. The choice of law embraces issues of procedural and substantive fairness, and
 - a. There is a sufficient connection between the chosen law and the issues to be decided; and
 - b. Application of the chosen law does not violate a fundamental public policy of the jurisdiction with the materially greater interest in the legal issues in dispute.¹¹⁶

Given the varying choice rules, including the Restatement (First), the Restatement (Second) and the Better Law Approach, there exists no clear consensus regarding how to analyze a choice of law provision in premarital agreements. Although commercial law has moved toward privatization¹¹⁷ and has recognized the right of business partners to control contractually the law used to resolve conflicts, other areas of the law have moved in the other direction. For example, many jurisdictions have enacted mandatory rules to protect specific groups, including consumers and employees.¹¹⁸ Instead of relying upon a sophisticated business partner's model to analyze premarital agreements, legislatures and courts should embrace an equitable approach and shift the focus to fairness.¹¹⁹ Clearly, there is a need for reform to introduce a uniform standard that protects the state's interest in achieving fair and just results following divorce and defines a more limited degree of personal autonomy in the realm of premarital agreements.

IV. THE UPAA CHOICE OF LAW PROVISION CREATES CONFUSION

Although the UPAA introduced a standard approach, practitioners would be mistaken to resort to the UPAA for clarification regarding the applicable law to decide validity questions. Section 3 of the UPAA specifically identifies the matters with respect to which the parties may contract:

- (a) Parties to a premarital agreement may contract with respect to:

116. In reality, few jurisdictions engage in a full section 187 analysis to determine the validity of a choice of law provision contained in a premarital agreement. *See infra* Part V.B.

117. Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 168 (2004).

118. SCOLES ET AL., *supra* note 62, at 986.

119. A.L.I. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05, cmt. b (2006) (exploring the reasons that premarital agreements should be treated differently than commercial contracts).

- (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
- (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
- (4) the modification or elimination of spousal support;
- (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
- (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
- (7) *the choice of law governing the construction of the agreement;* and
- (8) *any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.*¹²⁰

The UPAA choice of law provision is circumspect. It tracks the Restatement (Second) section 187 approach by expressly authorizing choice of law provisions related to construction and permitting the parties to contract as to any other matter, presumably including validity standards, so long as the provision accords with applicable public policy constraints. The drafting Committee, composed of members of the American Law Institute, expressly debated the scope of the UPAA choice of law provision. The notes from the debate highlight the intended distinction between legal questions related to construction and legal questions related to validity and enforceability.¹²¹

120. UNIF. PREMARITAL AGREEMENT ACT § 3 (2006) (emphasis added). Provisions dealing with child custody, child support, the religious upbringing of a child and, in some states, spousal support and alimony may be deemed unenforceable and in violation of public policy. For example, a “no-child” provision in a premarital agreement embodies a private contract provision that offends the goal of marital stability and impermissibly interferes with a woman’s procreative rights. See Joline F. Sikaitis, Comment, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 CATH. U. L. REV. 335, 372 (2004).

121. See Proceedings in Committee of the Whole Uniform Antenuptial Agreements Act, at 40 (July 1983) [hereinafter Proceedings].

The UPAA has been adopted in 26 states.¹²² Surprisingly, it contains no guidance for courts called upon to determine choice of law disputes generally, much less with respect to the nuanced distinctions between validity, enforceability and construction issues. The UPAA is silent in relation to the conflict principles of significant contacts, governmental interests and public policy exceptions. This silence has created confusion.

When legislators adopt the choice of law approach in the UPAA, what is their intent with respect to the parties' ability to replace forum law with foreign rules regarding validity and enforceability, as opposed to interpretation and construction? The UPAA is silent regarding this issue. Among the 26 jurisdictions adopting the UPAA, only Utah expressly revised the choice of law provision to permit the court to disregard chosen law and apply the law of the domicile of either party in the interests of fairness.¹²³ Although it is the

122. UNIF. PREMARITAL AGREEMENT ACT § 1 (2006). The jurisdictions that have adopted a form of the UPAA include: Arizona at ARIZ. REV. STAT. ANN. §§ 25-201 to 25-205 (effective in 1991); Arkansas at ARK. CODE ANN. §§ 9-11-401 to 9-11-413 (effective in 1987); California at CAL. FAM. CODE §§ 1600 to 1617 (effective in 1987); Connecticut at CONN. GEN. STAT. §§ 46b-36a to 46b-36j (effective in 1995); Delaware at DEL. CODE ANN. tit. 13, §§ 321 to 328 (effective in 1996); District of Columbia at D.C. CODE §§ 46-501 to 46-510 (effective in 2001); Hawaii at HAW. REV. STAT. §§ 572D-1 to 572D-11 (effective in 1987); Idaho at IDAHO CODE ANN. §§ 32-921 to 32-929 (effective in 2005); Illinois at 750 ILL. COMP. STAT. ANN. 10/1 to 10/11 (effective in 1995); Indiana at IND. CODE §§ 31-11-3-1 to 31-11-3-10 (effective in 1997); Iowa at IOWA CODE §§ 596.1 to 596.12 (effective in 1991); Kansas at KAN. STAT. ANN. §§ 23-801 to 23-811 (effective in 1988); Maine at ME. REV. STAT. ANN. tit. 19, §§ 601 to 611 (effective in 1987); Montana at MONT. CODE ANN. §§ 40-2-601 to 40-2-610 (effective in 1987); Nebraska at NEB. REV. STAT. §§ 42-1001 to 42-1011 (effective in 1994); Nevada at NEV. REV. STAT. §§ 123A.010 to 123A.100 (effective in 1989); New Jersey at N.J. STAT. ANN. §§ 37:2-31 to 37:2-41 (effective in 1988); New Mexico at N.M. STAT. §§ 40-3A-1 to 40-3A-10 (effective in 1995); North Carolina at N.C. GEN. STAT. §§ 52B-1 to 52B-11 (effective in 1987); North Dakota at N.D. GEN. CODE §§ 14-03.1-01 to 14-03.1-09 (effective in 1985); Oregon at OR. REV. STAT. §§ 108.700 to 108.740 (effective in 1987); Rhode Island at R.I. GEN. LAWS §§ 15-17-1 to 15-17-11 (effective in 1987); South Dakota at S.D. CODIFIED LAWS §§ 25-2-16 to 25-2-25 (effective in 1985); Texas at TEX. FAM. CODE ANN. §§ 4.001 to 4.010 (effective in 1997); Utah at UTAH CODE ANN. §§ 30-8-1 to 30-8-9 (effective in 1995); Virginia at VA. CODE ANN. §§ 20-147 to 20-155 (effective in 1985). None of the states have modified the "Choice of Law" model language relating to the distinction between construction, validity and enforceability, thus perpetuating the ambiguity surrounding the public policy exception to otherwise valid choice of law provisions in premarital agreements. *See also* Kessler, *supra* note 12, at 116 (attorneys must conduct a common law analysis of forum law to determine the validity of a marital agreement choice of law provision).

123. UNIF. PREMARITAL AGREEMENT ACT § 4 cmt. (2006). The Utah choice of law statute provides: "the choice of law governing the construction of the agreement, except that a court of competent jurisdiction may apply the law of the legal domicile of either party [in the interests of fairness and equity.]" UTAH CODE ANN. 30-8-4 (2006).

only jurisdiction to have recognized the importance of the law of the domicile, the Utah revision fails to recognize and address the scope of the choice of law under the UPAA.¹²⁴

Laudably, like Utah, other jurisdictions have also retained the forum court's right to determine matters of conscionability according to forum law. For example, in Iowa, the statute provides, "In any action under this chapter to revoke or enforce a premarital agreement the issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law."¹²⁵ While addressing the impact of substantive unfairness, the Iowa statute leaves unanswered the question of whether an Iowa forum court would enforce an agreement, under a foreign choice of law provision, designating a standard that provided fewer procedural protections than the forum to the party asserting invalidity. Similarly, in Maine, the legislature created a *de facto* sunset provision by requiring both parties to reaffirm their premarital agreement upon the birth of children:

Except as otherwise provided in this section, an effective premarital agreement is void 18 months after the parties to the agreement become biological or adoptive parents or guardians of a minor. The premarital agreement is not void if, within the 18-month period, the parties sign a written amendment to the agreement either stating that the agreement remains in effect or altering the agreement. . . . This section does not apply to premarital agreements executed on or after October 1, 1993.¹²⁶

The Maine reaffirmation requirement raises the question as to whether parties may displace the Maine standard through a foreign choice of law provision.

North Dakota expands the court's conscionability oversight to include all economic matters, thus adding a conscionability requirement to the property waiver:

Notwithstanding the other provisions of this chapter, if a court finds that the enforcement of a premarital agreement would be clearly unconscionable, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the uncon-

124. Absent expansion by statute, the choice remains limited to matters of construction, leaving the critical determinations of validity and enforceability to Utah choice rules.

125. IOWA CODE § 596.9 (2006). Although assigning the determination of conscionability to the judge, rather than a jury, this provision is unhelpful because it fails to define the controlling law as to these matters.

126. ME. REV. STAT. ANN. tit. 19-A § 606 (2006).

scionable provisions, or limit the application of an unconscionable provision to avoid an unconscionable result.¹²⁷

Although no North Dakota court has addressed the scope and validity of a foreign choice of law provision under the North Dakota Premarital Agreement Act, the statute expands the court's power to invalidate agreements based upon substantive unconscionability. This standard arguably creates a brand of justice and fairness emblematic of North Dakota public policy that may not be supplanted by a standard affording lesser protection.

A review of the debate on the adoption of the UPAA reveals that the Commissioners clearly intended that the model statute limit the scope of a choice of law provision in premarital agreements to include only matters of construction.¹²⁸ Thus, absent an express statement expanding the scope of a choice of law provision, the parties may not choose the law to govern matters of validity and enforceability under the UPAA.¹²⁹ This interpretation is reinforced by the substantive provisions of the UPAA. For example, support waivers may not render a spouse or former spouse dependent on state aid and parties may not escape this economic duty by designating a foreign law under which such a waiver is valid.

New Mexico excludes entirely from its enactment of the UPAA the provision permitting spouses to waive or limit spousal support or alimony. Instead, the New Mexico statute provides: "A premarital agreement may not adversely affect the right of a child or spouse to support, a party's right to child custody or visitation, a party's choice of abode or a party's freedom to pursue career opportunities."¹³⁰ California affirmatively requires that spouses have independent representation as a precondition to enforcing a spousal support waiver provision in a premarital agreement.¹³¹ South Dakota omits sub-

127. N.D. CENT. CODE § 14-03.1-07 (2006).

128. Proceedings, *supra* note 121, at 40.

129. Although the term "construction" is a term of art with a limited meaning, the catch-all provision, "or any other matter," permits choice of law provisions designating validity and enforceability standards, so long as such a designation is legal. This interpretation conflicts directly with the comment that narrowly defines the authority of the parties to choose applicable law.

130. N.M. STAT. § 40-3A-4 (2006) (omits UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4) (2006) (dealing with support)).

131. CAL. FAM. CODE § 1612 (2006) adds subsection (c) (designated (c) in the California act), which provides:

(c) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not

section (a)(4) entirely, thus prohibiting premarital provisions relating to spousal support and alimony.¹³² These jurisdictions have rejected the UPAA's limited personal autonomy approach in favor of laws treating support and alimony as non-waivable obligations. Thus, courts retain the authority to award economic relief to attain important public policy goals. By modifying the uniform approach to make support waivers more difficult, these legislatures identified and furthered state fairness interests. Given this modification of the uniform act, it is unlikely that a mere choice of foreign law could evade the social welfare goal of treating the right to alimony as inalienable before divorce.

Additionally, a limited interpretation of the scope of the choice of law provision also protects state autonomy. As previously noted, Iowa, Maine and North Dakota impose substantive fairness requirements as to the property waiver provisions as a precondition of enforcement. Despite the drafters' intent to limit the scope of the chosen law to questions of construction alone, research reveals that courts in UPAA states regularly cite this section of the UPAA to justify application of the chosen law to matters of contractual validity and enforceability.¹³³ Practitioners, parties and the courts could all benefit from a uniform interpretation of the UPAA choice of law provision.¹³⁴

In summary, the UPAA raises more choice of law questions than it answers. Is validity determined by the law and policy of the forum or the chosen law?¹³⁵ Clearly, decisions related to validity and enforceability are not within the scope of the model choice of law provision designating the law under which the agreement is to be construed. Thus, legal issues related to enforceability and validity remain subject to the general contract law of the jurisdiction in which enforcement is sought, unless the choice clause expressly encompasses matters of validity, thus triggering the choice of law and conflict rules of the forum.

Given the limited scope of the UPAA choice of law provision, one might predict that the UPAA states following the Restatement (First) would totally ignore choice provisions as outside the scope of a premarital agree-

become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

132. S.D. CODIFIED LAWS § 25-2-18 (2006) (omits UNIF. PREMARITAL AGREEMENT ACT § 3(a) (4) (2006) (dealing with support)).

133. See *infra* notes 244-55 and accompanying text.

134. Not only have states adopted different formulations of the UPAA choice of law provision, there is no uniformity in state application of the choice of law provision in states adopting the act as proposed. See *infra* notes 133-34 and accompanying text.

135. The most recent comprehensive publication by the A.L.I. addresses procedural and substantive fairness issues but fails to address the permissible scope of choice of law provisions in premarital agreements. See A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 7.01-7.12 (2003).

ment. In UPAA jurisdictions following the Restatement (Second), choice provisions would be enforced as to construction issues only. The following survey of case law demonstrates that the narrow scope of the UPAA is rarely argued.

V. PUBLIC POLICY AND CHOICE PROVISIONS

Because every state has a unique legal standard related to the validity and enforceability of premarital agreements, if parties designate a foreign law, counsel and courts should consider the possibility that forum validity rules or public policy exceptions might invalidate or render unenforceable a premarital agreement. A literal interpretation of the UPAA choice of law provision, embracing only questions of construction, advances state autonomy by limiting that of the individual. Because premarital agreement litigation is inextricably connected with public policy, the law of the jurisdiction with the materially greatest interest should identify the conditions required for future spouses to effectively release property and support rights that cannot be identified, valued, or divided, unless and until the parties' marriage ends in divorce.

With respect to a premarital agreement, a court need determine the enforceability of a choice of law provision only if the laws of the competing jurisdictions lead to different outcomes, creating a true conflict.¹³⁶ This determination requires a complete analysis of all issues under the law of the interested jurisdictions, taking the applicable choice of law rules into account. In reality, judicial treatment of potential conflicts and the scope and validity of chosen law is inconsistent and scattered. For example, in *Rathjen v. Rathjen*,¹³⁷ the Texas Court of Appeals noted that the premarital agreement executed by the parties contained a provision stating that the agreement should be "interpreted" according to Hawaii law.¹³⁸ Even though questions related to validity and interpretation are not synonymous, the parties stipulated that Hawaii law controlled questions of validity, thus eliminating the scope of the choice of law provision from contention.¹³⁹ Therefore, the court concluded that Hawaii law controlled issues of substantive law.¹⁴⁰ Although Texas is a Restatement (Second) state, the court undertook no multi-faceted analysis to decide the scope and validity of the provision. Ultimately, the court side-stepped the question of whether the contract violated a fundamental Texas

136. *Rathjen v. Rathjen*, No. 05-93-00846-CV, 1995 WL 379322, *8-9 (Tex. App. May 30, 1995).

137. *Id.*

138. *Id.* at *2.

139. *Id.* Such a stipulation by Barry and Sun Bonds did not dissuade the California Court of Appeals from raising the choice of law issue *sua sponte*. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 790 (Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

140. *Rathjen*, 1995 WL 379322 at *9.

public policy by finding that “because Hawaii law is substantially similar to Texas law, enforceability of the PMA does not offend fundamental Texas policy.”¹⁴¹

In *Rhyne-Morris v. Morris*,¹⁴² the Alabama court, in a Restatement (First) jurisdiction, also relied upon the similarity of Hawaii law to reverse a trial court order invalidating a premarital agreement containing a Hawaii choice of law provision.¹⁴³ The appellate court held that the trial court improperly concluded that the absence of separate representation invalidated the agreement under Alabama law.¹⁴⁴ The court remanded the matter with express instructions for the trial court to “consider Hawaii law and to determine the validity of the antenuptial agreement after determining which state’s law controls.”¹⁴⁵ Even with the benefit of appellate review, it remains unclear what choice standards the *Rhyne-Morris* trial court was expected to apply on remand and the role that Alabama law should properly play in determining the validity and enforceability of premarital agreements.¹⁴⁶ In both of the foregoing cases, the court failed to address the proper choice of law rules to resolve the potential conflict between the law of the jurisdiction with the materially greatest interest and the chosen law. A survey of recent cases addressing choice of law disputes in premarital agreement litigation demonstrates an erratic and unpredictable judicial approach, providing little guidance to practitioners, their clients and sister courts.

The balance of the case law reviewed in this section of the article is divided into three additional sections. The first sub-section examines the case

141. *Id.* The Texas court’s finding of “substantial similarity” is somewhat suspect given that the Texas standard requires “fair and reasonable disclosure of the property or financial obligations of the other party,” *id.* at *8, or a written waiver of such disclosure while the applicable Hawaii standard requires a mere “knowledge of financial situation of the prospective spouse.” *Lewis v. Lewis*, 748 P.2d 1362, 1366 (Haw. 1988). The Rathjen court’s cursory treatment of the section 187 factors fails to address: 1) whether there existed a true conflict, 2) which jurisdiction had a materially greater interest in the outcome, and 3) whether application of the chosen law would violate a fundamental public policy of the otherwise applicable law.

142. 671 So. 2d 748 (Ala. Civ. App. 1995).

143. *Id.* at 750.

144. *Id.*

145. *Id.*

146. Although Hawaii adopted the UPAA in 1987, it applied only prospectively; therefore, traditional contract principles determined the validity of premarital agreements executed before 1987. *Lewis*, 748 P.2d at 1365. Likewise, Alabama applied traditional contract rules to determine the validity of premarital agreements. *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980). However, Alabama also placed the burden of proof to validate the agreement on the party seeking to rely upon it and required the moving party to show that the transaction was “fair, just, and reasonable.” *Id.* at 752. Clearly, the party seeking to rely on the agreement to bar property claims would rather proceed under the Hawaii standard. Thus, the opinion offered little guidance on the pivotal issue of the applicable law.

law interpreting premarital agreement choice of law questions in Restatement (First) jurisdictions. The second sub-section examines case law interpreting premarital agreement choice clauses in Restatement (Second) jurisdictions. The second sub-section is further subdivided into three subsections: 1) jurisdictions that interpreted choice clauses narrowly to apply only to questions of contract construction; 2) jurisdictions that interpreted choice clauses broadly to embrace validity and construction issues, subject to forum public policy concerns; and 3) jurisdictions that collapse the validity and enforceability analysis into an ad hoc public policy analysis. The third and final sub-section examines case law in which the court applies the forum public policy exception to invalidate support waivers without regard to the forum's conflict approach. The following critique of the existing case law is designed to highlight analytical inconsistency among states with similar rules and to illustrate the need for reform.

A. Restatement (First) Courts Employ Lex Loci Rule in Concert with the Public Policy Escape Provision

In addition to the *Rhyne-Morris* case, research revealed at least four cases in which courts determined the validity of a premarital agreement in a Restatement (First) jurisdiction.¹⁴⁷ As previously noted, parties to premarital agreement litigation in a Restatement (First) jurisdiction might predict that: 1) courts will disregard choice of law provisions as outside of the scope of the contract and 2) courts will apply *lex loci* law unless to do so would violate a fundamental public policy of the forum.¹⁴⁸ Although faithful to the Restatement (First) approach, this prediction is only partially correct. No court expressly rejected the authority of parties to a premarital agreement to identify controlling law in a choice of law provision. Two courts applied the forum law based upon the fundamental public policy exception.¹⁴⁹ In contrast, two courts enforced agreements under foreign law as required by the *lex loci* approach.¹⁵⁰ Despite careful study, no consistent rule emerges from these cases.

In *Estate of Davis*, the Tennessee court followed a classic Restatement (First) approach to invalidate a foreign premarital agreement to avoid violating Tennessee fundamental public policy. Under *lex loci* precepts, Florida law, the jurisdiction of execution, would apply to the agreement unless an

147. See *Black v. Powers*, 628 S.E.2d 546 (Va. Ct. App. 2006); *In re Estate of Davis*, No. M2003-02614-COA-R3-CV, 2004 WL 1950729 (Tenn. Ct. App. Sept. 2, 2004); *Tarburton v. Tarburton*, No. CN96-6373, 1997 WL 878411 (Del. Fam. Ct. July 8, 1997); *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982).

148. See *infra* notes 151-70 discussing Restatement (First) jurisdictions' treatment of premarital agreement choice of law litigation.

149. *Estate of Davis*, 2004 WL 1950729 at *3; *Scherer*, 292 S.E.2d at 664.

150. *Black*, 628 S.E.2d at 556; *Tarburton*, 1997 WL 878411 at *5.

exception applies.¹⁵¹ Under Tennessee law, a contract in violation of Tennessee law will not be enforced if it violates public policy.¹⁵² The court noted that although Florida had eliminated the requirement of full and fair financial disclosure to ensure the validity of a premarital agreement in the probate context, Tennessee retained the requirement.¹⁵³ The court concluded that the disclosure requirement furthered a substantial and important public policy: to promote the highest degree of fiduciary duty between spouses. Absent disclosure, the agreement violated fundamental public policy and was, therefore, unenforceable:

In general, parties are free to contract under binding terms unless contrary to an overriding social policy. . . . Thus, regardless of the generally applicable *lex loci* rule of contracts, courts apply Tennessee law under circumstances where applying the law of a sister [state] would contravene a strong public policy of Tennessee. . . . A contract which violates Tennessee public policy will not be enforceable in Tennessee, although it is enforceable in the state in which it was executed.¹⁵⁴

Similarly, the Supreme Court of Georgia ignored the chosen law of Michigan and applied the forum law to determine the validity and enforceability of a premarital agreement. In *Scherer v. Scherer*, the parties, then residents of Michigan, executed a premarital agreement in 1976 that designated Michigan law as controlling even if the parties later relocated to another state.¹⁵⁵ The parties relocated to Georgia and the husband filed for divorce in 1980, raising issues related to the validity and interpretation of the Michigan agreement.¹⁵⁶ Under Georgia law, whenever a contract raises public policy issues, forum law applies.¹⁵⁷ This, perhaps, explains why both parties agreed to the application of Georgia law.¹⁵⁸ Thus, the *Scherer* court enforced the agreement under forum law.¹⁵⁹ As is evident, both Tennessee and Georgia disregarded the *lex loci* rule and applied forum law to determine the validity and enforceability of premarital agreements.

151. *Estate of Davis*, 2004 WL 1950729 at *3.

152. *Id.*

153. *Id.* at *6.

154. *Id.* at *3 (citations omitted).

155. *Scherer*, 292 S.E.2d at 664 (Georgia court ignores express Michigan choice of law and validates agreement under Georgia law and public policy).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 667.

In contrast, in *Tarburton v. Tarburton*,¹⁶⁰ the Delaware court applied the then applicable Restatement (First) approach and applied Pennsylvania law, the chosen law, to determine the validity of a premarital agreement executed in Pennsylvania.¹⁶¹ The court did not even consider the public policy exception to the *lex loci* rule, despite the fact that Delaware statutory law expressly provided that a premarital agreement must be executed at least ten days before the marriage.¹⁶² The premarital agreement under scrutiny failed this requirement. Arguably, the agreement was invalid under forum law. Nevertheless, the court applied Pennsylvania law to uphold the validity of the agreement. The court relied upon party expectations to support its application of the place-of-making rule.¹⁶³ The *Tarburton* court did not even address the potential public policy argument that the ten-day rule reflected a strong Delaware legislative desire to invalidate any premarital agreement executed less than ten days before the marriage.

Absent a choice of law provision, in *Black v. Powers*,¹⁶⁴ the Virginia Court of Appeals specifically addressed the issue of whether the validity of the premarital agreement should be determined according to the law of the place of execution or the law of the forum in which relief from the agreement is sought.¹⁶⁵ The appellate court reversed the trial court's application of Virginia law because, under Restatement (First) precepts, the law of the place of execution should have been applied unless the substantive law of the place of execution was "contrary to Virginia's public policy."¹⁶⁶ Rather than remand to permit a public policy argument, the appellate court applied the law of the place of execution, the Virgin Islands, and upheld the agreement.¹⁶⁷ In a footnote, the appellate court chided the trial court for applying a modern significant relationship approach given the Virginia Supreme Court's express rejection of it.¹⁶⁸ Virginia continues to adhere to the *lex loci* rule to decide choice of law disputes related to premarital agreements, demonstrating a preference to enforce premarital agreements, instead of remanding to permit litigation of any potential public policy exceptions.¹⁶⁹ This ruling raises fair-

160. No. CN96-6373, 1997 WL 878411 (Del. Fam. Ct. July 8, 1997). In this case, the chosen law was also the *lex loci*, eliminating any need to address the parties' power to designate controlling law in a Restatement (First) jurisdiction. *Id.* at *4.

161. *Id.* at *6.

162. *Id.* at *1.

163. *Id.* at *4-*5.

164. 628 S.E.2d 546 (Va. Ct. App. 2006).

165. *Id.* at 553.

166. *Id.*

167. *Id.* 560-61. The place of execution approach comports with Virginia's application of the Restatement (First).

168. *Id.* at 556 n.11.

169. *Id.* at 556. The trial court applied Virginia law in reliance upon the exception that forum law will apply if the parties intended to perform the agreement in the forum. *Id.* at 552. The Court of Appeals reversed because there was insufficient evi-

ness concerns because the choice of law decision was arguably outcome determinative.¹⁷⁰

B. Restatement (Second) Courts Diverge in the Treatment of Premarital Agreement Choice Provisions

The analytical distinction between validity and construction in relationship to choice of law and premarital agreements has been expressly examined in just a handful of cases in the United States. In these cases, courts have considered the argument that questions related to premarital agreement construction may be subject to chosen law, although questions of validity remain subject to forum law.¹⁷¹ For example, California courts must first determine the validity of an agreement before questions of construction according to the chosen law can even be addressed.¹⁷² In contrast to the California approach, Connecticut courts apply the chosen law to determine matters related to validity and construction.¹⁷³ The remaining jurisdictions broadly interpret choice of law provisions in premarital agreements without even addressing the distinction between the legal standard that governs the validity of the agreement and the legal standard that determines questions of construction.¹⁷⁴ An examination of the varying approaches to choice of law provisions and premarital agreements in Restatement (Second) jurisdictions reveals that courts rarely follow the section 187 analysis.

1. The California five-step: the *Bonds* court applies forum law to determine validity and enforceability

The California Court of Appeals in *In re Marriage of Bonds*¹⁷⁵ held that parties to premarital agreements were not permitted to identify the standard of validity to be employed by a court should the validity of the agreement be litigated in a California court. Instead, the *Bonds* court applied California premarital agreement law to decide the validity of the agreement executed by the parties in Arizona.¹⁷⁶

dence that the parties intended that the contract would be wholly performed in Virginia. *Id.* at 555-56.

170. *Id.* at 553 n.6 (court notes the agreement may be invalid under Virginia law because there was no evidence that wife signed the agreement with the benefit of "competent independent advice").

171. McDOUGAL ET AL., *supra* note 87, at 500-01.

172. *See, e.g., Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 791 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

173. *See, e.g., Elgar v. Elgar*, 679 A.2d 937, 941 (Conn. 1996).

174. *See, e.g., Nanini v. Nanini*, 802 P.2d 438, 441 (Ariz. Ct. App. 1990).

175. *Bonds*, 83 Cal. Rptr. 2d at 783.

176. *Id.* at 791.

The *Bonds* litigation surrounded the validity of a premarital agreement signed by Barry Bonds and his fiancée, Sun, the day before the parties married in Las Vegas. The agreement contained a provision under the heading “Situs,” providing that the agreement would be “subject to and governed by” the laws of the state set forth as the “effective place of the agreement.” However, the agreement failed to identify the effective place.¹⁷⁷ The trial court ruled that because the contract was executed in Arizona, the “situs” of the agreement, Arizona law would apply.¹⁷⁸ The trial court reasoned that the parties could not have anticipated that California law would apply since they were domiciled in Arizona at the time of the execution of the agreement.¹⁷⁹ Curiously, the parties stipulated that Sun would bear the burden of proof to establish the invalidity of the agreement, even though under Arizona law, this burden rested with the proponent of the agreement, in this case Barry.¹⁸⁰ The trial court ultimately upheld the validity of the agreement.¹⁸¹

Sun filed a limited appeal. Sun did not appeal the trial court’s determination that Arizona law applied, but challenged its conclusion that the agreement survived the Arizona validity standard. Alternatively, Sun asserted that the agreement was also invalid under California law in case Bonds succeeded on his cross-appeal asserting that California law applied and asserting that under either legal standard, the agreement was valid.¹⁸² On appeal, the court focused upon the circumstances surrounding the execution of the agreement to determine the pending issues.

The California Court of Appeals noted that Sun reviewed the document for the first time hours before the parties were to board their flight to Las Vegas. She was not represented by counsel.¹⁸³ The parties met at Bonds’ attorney’s office on February 5, 1988, to sign the premarital agreement prepared by Bonds’ attorney, the execution of which was a prerequisite for the wedding to follow the next day, February 6, 1988.¹⁸⁴ The wedding was

177. *Id.*

178. *Id.* at 790.

179. *Id.* at 789.

180. *Id.* at 797. Under Arizona law, the party advancing the agreement had to prove its validity. *Id.* Although the appellate court rejected the parties’ ability to shift the burden of proof in pending litigation, it deemed the error harmless because forum law placed the burden on the party seeking to set it aside, in this case, Sun. *Id.*

181. *Id.* at 790.

182. *Id.*

183. *Id.* at 788. Sun, a native of Sweden, had met Bonds in the summer of 1987, relocated to live with Bonds in November of 1987 and subsequently accepted Bonds’ marriage proposal. *Id.* at 787.

184. *Id.* at 788. Sun spoke Swedish, French, and English. Sun reviewed the agreement and signed it without requesting any changes. Bonds presented to Sun a hand-written list of his assets at the meeting and Sun identified no inaccuracies in the list. The parties reviewed the agreement, signed it and left for their flight. *Id.*

scheduled to take place before Bonds reported for Spring Training as a member of the Pittsburgh Pirates under contract for \$106,000.¹⁸⁵

The parties subsequently married as planned. During their marriage, the parties had two children and Sun stayed at home to care for them while Bonds pursued his Major League Baseball career.¹⁸⁶ When the parties separated in 1994, Bonds was under contract at \$8,000,000 dollars per year.¹⁸⁷ After Bonds filed for divorce, Sun answered with a request for custody of the children, child and spousal support, attorney's fees and determination of property rights, thus raising the issue of the validity of the agreement.¹⁸⁸ The facts surrounding the execution of the agreement raised issues related to the procedural fairness of the circumstances surrounding the agreement, as well as the substantive fairness of the complete waiver of property and support rights.¹⁸⁹

Although neither party challenged the applicability of Arizona law on appeal, the California Court of Appeals raised the issue *sua sponte* and requested supplemental briefs to resolve the issue.¹⁹⁰ In its subsequent opinion, the court addressed the issue of whether to apply Arizona or California law to a premarital agreement executed in Arizona, a Restatement (Second) jurisdiction.¹⁹¹ The court relied upon the California Premarital Agreement Act ("Cal. P.A.A.") to inform its decision. The court interpreted, in a limited manner, Cal. P.A.A. section 1612(a), providing that "[p]arties to a premarital agreement may contract with respect to . . . [t]he choice of law governing the construction of the agreement . . . [and any other matter] not in violation of public policy."¹⁹² According to the court, the word "construction" contained in Cal. P.A.A. section 1612(a), embraced only questions of contract interpretation, as opposed to matters of validity and enforceability. According to the court, under the Cal. P.A.A., matters of validity and enforceability were subject to Cal. P.A.A. section 1615, the "key operative section" of the statute.¹⁹³ In support of its narrow interpretation of the scope of a premarital agreement choice of law provision, the *Bonds* court relied upon the notes from the proceedings in which the commissioners discussed the language and meaning of the UPAA choice of law provision.

While discussing the choice of law provision in the UPAA, one commissioner explained the meaning of this section:

First of all, on [the] subsection . . . involving choice of law, remember that they are talking here about construction, and the kinds

185. *Id.* at 787.

186. *Id.* at 789.

187. *Id.*

188. *Id.*

189. *Id.* at 795-97.

190. *Id.* at 790.

191. *Id.*

192. *Id.* at 791.

193. *Id.* at 792.

of things that could be spelled out, and you want to distinguish that from validity and enforcement. A forum will not enforce a contract and provide a remedy which is contrary to its local public policy. But, on the other hand, if it's simply a matter of using the law of another state as a dictionary for construction, you really don't need a substantial relationship.¹⁹⁴

According to the California appellate court, "the [C]ommissioners intended this provision to refer to the interpretation of, or the definitions used in, the contract rather than to the issue of validity."¹⁹⁵ Therefore, the court narrowly interpreted the scope of the choice of law provision in the parties' agreement and applied Cal. P.A.A. section 1615, the section setting forth the procedural and substantive fairness requirements, to decide the validity and enforceability of the *Bonds* agreement.

The *Bonds* choice of law discussion is perhaps most intriguing because of the analysis the court forgoes. The *Bonds* court reads the Cal. P.A.A. as creating an implied provision designating California law, forum law, as controlling all issues related to validity. However, the court fails entirely to address the role, if any, of the Restatement (Second) approach or the Comparative Impairment Approach in relationship to the question of whether Arizona or California law should control questions of validity.¹⁹⁶ The opinion is curiously silent as to whether a true conflict existed and as to which state's policy interests should have controlled. The opinion is devoid of any analytical guidance regarding the proper framework to follow when the parties have failed to designate the applicable law to control their contract. The absence of any traditional choice of law analysis, or alternatively, why such analysis is irrelevant in California is disappointing.¹⁹⁷

194. *Id.* at 791-92 (citing Proceedings in Committee of the Whole Uniform Antenuptial Agreements Act, at 40 (July 1983)).

195. *Id.* at 791. By narrowly interpreting the scope of a choice of law provision in a premarital agreement advanced in California litigation, the court rendered irrelevant the debate between the parties regarding the incomplete and ambiguous choice of law provision. *Id.*

196. California courts follow the Restatement (Second) section 187 approach in interpreting the validity of Choice of Law Clauses, informed by the Comparative Impairment Approach in determining which state has the materially greater interest in the outcome. *Application Group Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 83-84 (Cal. Ct. App. 1998). This standard is particularly difficult to understand because the California courts have yet to provide guidance on how to mesh these two approaches. *Id.*

197. The *Bonds* court avoided a series of difficult questions associated with a traditional conflict analysis. These questions included: (1) Was there a true conflict?; (2) Did the parties intend to identify foreign law as controlling in relationship to matters of construction and validity?; (3) If so, what law would otherwise apply?; and (4) Which jurisdiction's interests, those of the chosen law or the otherwise applicable law, would be more impaired if ignored? Instead of conducting an express section 187

It is particularly worrisome because the decision to apply California law to decide the validity of the *Bonds* Arizona agreement was arguably outcome determinative. The Arizona standard in place at the time of execution favored the economically dependent spouse by placing the burden of proof on the proponent of the agreement, in this case Barry, and by requiring the proponent to establish that the agreement was free from fraud, coercion or undue influence; the spouse acted with full knowledge of the property involved and her rights therein; and the agreement was fair and equitable.¹⁹⁸ In contrast, the California standard placed the burden on the party seeking to set the agreement aside, in this case Sun, to prove that the agreement was involuntary or unconscionable and executed without the benefit of full disclosure.¹⁹⁹ Thus, under Arizona law, it is uncertain whether Barry could have established that the agreement was fair and equitable. However, Barry was relieved of this potentially insurmountable burden by the application of California law.²⁰⁰

Only one issue remained open on appeal: the question of voluntariness. Regarding voluntariness, the *Bonds* court invalidated the agreement using a California “strict scrutiny” involuntariness standard.²⁰¹ The court based its finding of involuntariness upon the absence of separate representation, the limited time frame afforded to Sun to review the agreement, Sun’s questionable grasp of the English language, and the failure of Bonds’ attorneys to impress upon Sun the importance of retaining separate representation.²⁰² Barry appealed the decision invalidating the agreement as involuntary.²⁰³

The California Supreme Court accepted review on the sole question of the proper burden of proof to invalidate a premarital agreement under California law.²⁰⁴ The high court reversed the California Appellate Court because it had incorrectly identified and applied a “strict scrutiny standard” to evaluate the question of voluntariness, when in fact the correct standard on appeal was whether substantial evidence supported the trial court’s determi-

analysis, the *Bonds* court interpreted the Cal. P.A.A. as requiring the application of California validity standards to enforce foreign premarital agreements in California.

198. *Id.* at 791.

199. *Id.* at 790-91.

200. Despite this shortcoming, the application of California law to control the validity of a California couple divorcing in California makes good policy sense because California has the materially greatest interest in the outcome of the issues since it is the last marital domicile and the domicile of both spouses at the time of dissolution.

201. *Id.* at 816 (Ruvolo, J., dissenting).

202. *Id.*

203. *Bonds v. Bonds (In re Marriage of Bonds)*, 5 P.3d 815, 821 (Cal. 2000).

204. *Id.*

nation that Sun entered the agreement voluntarily.²⁰⁵ Thus, the California Supreme Court reversed the appellate court's decision and reinstated the trial court's ruling upholding the validity of the agreement. The California Supreme Court remanded the case to the California Court of Appeal for any necessary modifications to the remaining issues on appeal in light of the high court's decision.²⁰⁶

Despite reversal on the voluntariness issue, the *Bonds* appellate court decision requiring the mandatory application of forum law to decide matters of premarital agreement validity remains controlling in California. This bedrock rule requires California courts to look to forum law to resolve the question of validity, thus limiting foreign choice of law provisions to matters of premarital agreement construction only.²⁰⁷ In summary, under *Bonds*, California courts deciding the validity of a premarital agreement must:

1. Limit a choice of law provision in a premarital agreement stating this agreement "shall be subject to and governed by the laws of the place set forth as the effective place"²⁰⁸ to encompass matters of construction only;
2. Determine validity of a premarital agreement according to Cal. P.A.A. section 1615;
3. Determine enforceability of a premarital agreement according to general precepts of California public policy;
4. Determine issues of construction according to the chosen law; and
5. Treat as irrelevant any arguments related to California's Comparative Impairment approach in a conflict dispute.²⁰⁹

205. *Id.* at 838. The California Supreme Court's decision to grant appeal highlights the potential for courts to misapply forum premarital agreement validity standards, even in UPAA states.

206. *Id.*

207. See Rebecca Glass, *Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California*, 92 CAL. L. REV. 215, 228-31 (2004) (discussing the revisions to the California Uniform Premarital Agreement Act with respect to voluntariness in direct response to the California Supreme Court's lenient interpretation of the voluntariness requirement). The revised legislation was silent with respect to the choice of law issues raised by the *Bonds* case.

208. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 789 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

209. California follows the "Comparative Impairment" approach to conflict questions. See *Offshore Rental Co. v. Cont'l Oil Co.* 22 Cal. 3d 157, 163 (1978).

The *Bonds* decision highlights the legal distinction between questions of validity and contractual construction.²¹⁰ It leaves unanswered the applicability of the Cal. P.A.A. provision permitting the parties to expand the scope of the choice of law provision in reliance upon the right of parties to contract regarding “any other matter . . . not in violation of public policy.”²¹¹ The *Bonds* decision also fails to address the criticism that such a limited interpretation of a choice of law provision renders it virtually meaningless and the applicability of the Restatement (Second) sections 187 and 188.²¹²

2. The Connecticut four-step: the *Elgar* court applies chosen law to determine validity

Over the past decade, the Connecticut courts have interpreted the scope of choice of law provisions in premarital agreements broadly, to encompass all legal issues surrounding the contract including validity, enforceability and interpretation. The Connecticut approach differs from the California approach in relationship to the scope of the choice of law clause in premarital agreements. California limits the scope of premarital agreements to matters of construction, preserving validity and enforceability questions to be determined by forum law.²¹³ In contrast, Connecticut interprets a choice of law clause to embrace all legal issues related to the premarital agreement, including validity and enforceability disputes.²¹⁴ The Connecticut approach arguably affords too little deference to the Connecticut legislature’s decision to create additional procedural fairness hurdles to protect residents from fraud and misrepresentation embodied in the Connecticut Premarital Agreement Act (“Con. P.A.A.”) adopted in 1995.²¹⁵

In *Elgar v. Elgar*,²¹⁶ the court addressed the scope of a choice of law provision contained in a premarital agreement in relationship to issues of validity and enforceability. The premarital agreement expressly provided that the agreement was “being made pursuant to New York law and would be

210. See *Bonds*, 5 P.3d at 838.

211. The *Bonds* court’s limited interpretation of the “construction” provision, raises the issue of whether parties to a California premarital agreement could expressly identify the law of another jurisdiction, other than that of California, to determine issues of validity and enforceability under CAL. FAM. CODE § 1612 (7) (West 2006).

212. *Elgar v. Elgar*, 679 A.2d 937 (Conn. 1996). The Connecticut court relies upon Restatement (Second) section 187 to enforce New York choice of law provision to questions of validity and enforceability of premarital agreement despite Connecticut’s more rigorous standards.

213. *Bonds*, 83 Cal. Rptr. 2d at 791.

214. See *Elgar*, 679 A.2d at 942.

215. CONN. GEN. STAT. § 46b-36g (2004) (court will not enforce agreements that are unconscionable at the time enforcement is sought).

216. *Elgar*, 679 A.2d at 941.

interpreted accordingly.”²¹⁷ The court rejected the plaintiff’s argument that validity should be determined, not by the chosen law, but by the forum law of Connecticut because the argument placed “the cart before the horse”²¹⁸ by substituting forum law for chosen law before establishing the required public policy justification. The court reasoned that the application of forum law to determine matters of validity rendered choice of law provisions “meaningless.”²¹⁹ Thus, absent misrepresentation, undue influence, or mistake directed specifically to the choice of law provision,²²⁰ choice of law provisions are enforceable.²²¹

As previously discussed, section 187 identifies two exceptions to the general rule that valid choice of law provisions in contracts are enforceable.²²² The first exception arises if the chosen law lacks a substantial relationship to the parties or the transaction, or some other reasonable basis.²²³ In dismissing this exception, the *Elgar* court reviewed a series of contacts with New York. Most notably, the plaintiff was at all times a resident of New York, she maintained and conducted her business there, and the contract was executed in New York.²²⁴ Thus, the insufficient relationship argument failed.

Having determined that the premarital agreement was subject to New York standards of validity, enforceability and construction, the court next addressed the plaintiff’s argument that application of New York law would violate the fundamental public policy of Connecticut.²²⁵ Plaintiff asserted that by enforcing the agreement according to New York law, the court violated the public policy of Connecticut, the forum state with a materially greater interest in the outcome.²²⁶ The plaintiff argued that enforcing an agreement, absent the applicable procedural fairness protections, violated

217. *Id.* at 940.

218. *Id.* at 942.

219. *Id.*

220. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006)).

221. *Id.* In support of its decision, the *Elgar* court relied upon section 201 of the Restatement (Second) to support its decision. *Id.* Section 201 provides: “The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187-188.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 (2006). Thus, a party must prove that the choice of law provision itself was obtained as a result of fraud. The fraud standard of the forum state applies to this determination. The *Elgar* court’s analysis is similar to that advanced by the United States Supreme Court in its recent decision upholding mandatory arbitration provisions absent evidence that the provision itself was the product of fraud, misrepresentation or duress. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1208-10 (2006).

222. *See supra* notes 101-03 and accompanying text.

223. *See supra* notes 101-02 and accompanying text.

224. *Elgar*, 679 A.2d at 940.

225. *Id.* at 943.

226. *Id.* at 943-44.

Connecticut public policy.²²⁷ The Connecticut standard was more demanding than New York's because it created a fiduciary relationship between the parties.²²⁸ Although the decedent was a Connecticut resident and his estate was under probate there, the Connecticut court concluded that these contacts were not materially greater than New York's contacts.²²⁹ Plaintiff was a New York resident and had a business there.²³⁰ Even though plaintiff advocated the application of Connecticut law to a Connecticut estate question, the court ruled that New York had a materially greater interest in the litigation.²³¹ Thus, plaintiff's Connecticut public policy argument was dismissed as irrelevant.²³² In summary, the court rejected the section 187 public policy exception and enforced the choice of law.

The *Bonds* court interpreted the Cal. P.A.A. choice of law provision to apply only to matters of construction, thus obviating the need for any further analysis according to the Restatement (Second) section 187. In contrast, the Connecticut courts presume that the chosen law also embraces matters of validity. Thus, if the agreement is valid under the chosen law, the challenger is left to argue unenforceability of the agreement under the section 187 exceptions. This broad interpretation of choice of law provisions, in effect, eliminates the premarital agreement procedural protections, embodied in statutory validity standards of the jurisdiction with the materially greatest interest in the outcome.

Several years later, the Connecticut court again faced the issue of the enforceability of a New York choice of law provision contained in a premarital agreement challenged in a Connecticut court.²³³ The agreement was drafted by a New York lawyer, on behalf of a husband and required the application of

227. *Id.* at 942.

228. *Id.* Two years later, the Connecticut Superior Court relied upon *Elgar* to resolve a choice of law dispute related to a property settlement agreement. In *Oliver v. Oliver*, the court relied upon the *Elgar* analysis and enforced a Rhode Island choice of law provision absent evidence that the choice was a product of fraud. No. 95551531, 1997 WL 809917 (Conn. Super. Ct. Dec. 30, 1997). As in *Elgar*, the *Oliver* court construed the Rhode Island choice of law provision to encompass questions related to both validity and enforceability. *See id.* at *1. In buttressing its opinion, the court noted that both Rhode Island and Connecticut law required such agreements to be reasonable and fair, suggesting the absence of a true conflict. *Id.* at *4. In another 1995 premarital agreement case, the trial court relied upon the Restatement (Second) to apply Connecticut law, rather than Virgin Island law, in invalidating a premarital agreement. *Lord v. Lord*, No. 10 11 97, 1995 WL 17356,*4 (Conn. Super. Ct. Jan 9, 1995).

229. *Elgar*, 679 A.2d at 944.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Montoya v. Montoya*, No. FA010183420, 2003 WL 1090696 (Conn. Super. Ct. Mar. 4, 2003).

New York law to questions of execution and interpretation.²³⁴ After ruling that the choice of law provision was enforceable absent evidence of fraud, misrepresentation or duress, the court next addressed the validity of the agreement under New York law and upheld it. The wife asserted that the agreement offended the public policy of Connecticut as reflected by the Conn. P.A.A. Although the wife's argument is not fully developed by the court, it seemed to turn on the different standards of procedural protection afforded spouse's under Connecticut law and New York law. While Connecticut embraced a standard creating a fiduciary duty between the parties, New York did not. The court cautioned that the relatively new Conn. P.A.A. applied only to post 1995 agreements; however, it agreed that it codified the preexisting common law rule creating a fiduciary duty between engaged couples.²³⁵ The duty required "good faith, candor, and sincerity" between parties to a premarital agreement.²³⁶ While tempted by the "siren[s] song" of fiduciary breach, the court nevertheless enforced the agreement pursuant to New York law.²³⁷ The court attempted to soften its ruling by noting that New York would not enforce unconscionable agreements.²³⁸

Thus, Connecticut will enforce foreign choice of law provisions so long as the choice provision is valid according to the chosen law and Connecticut's policy interest in determining the enforceability of the agreement is materially less than the interests of the chosen state, eliminating the ability to argue that the agreement violates forum fundamental public policy. In summary, Connecticut courts:

1. Determine whether the chosen law creates a potential conflict;
2. Apply Restatement (Second) section 187(b) to identify the law of the jurisdiction that would apply but for the choice of law provision;

234. *Id.* at *1-*2.

235. *Id.* at *3.

236. *Id.*

237. *Id.* Perhaps the court, in seeking to follow the Restatement (Second), is referring to the tension created by the different policy interests at stake. The Connecticut standard embracing a fiduciary relationship conflicts directly with the New York traditional contract protections. In resolving this conflict, the court applied New York law and furthered New York policy without thoroughly considering the Connecticut policies and interests at stake.

238. *Id.* Arguably, under *Elgar*, absent a determination by the *Montoya* court that Connecticut had a materially greater interest in the case than did New York, the examination of the relative policy interests of both the jurisdictions was entirely unnecessary.

3. Determine which jurisdiction has a materially greater interest in the outcome, that of the chosen law or that of the otherwise applicable law; and
4. Determine validity, enforceability and construction according to the chosen law, absent evidence that enforcement would violate the fundamental public policy of the state with the materially greater interest in the issues.

How can the California and Connecticut approaches be synthesized? Can they peacefully coexist or does this disparate treatment of premarital agreements across state lines demand legal reform? The California court derived its authority to apply forum law to evaluate premarital agreements without regard to the parties' foreign choice of law provision from the Cal. P.A.A.²³⁹ Connecticut, also a UPAA state, relied instead upon Restatement (Second) section 201 comment (c),²⁴⁰ to inform its understanding of section 187. This enabled the court to justify its application of foreign validity standards so long as the applicable forum public policy is not offended. A chasm between these two modes of interpretation exists, even though both states have adopted the UPAA and apply section 187 of the Restatement (Second).²⁴¹ This disparate result can be explained by the limited interpretation of the Cal. P.A.A. choice of law provision. The California approach is arguably superior because it affords the forum the authority to apply its own validity standard and to maintain control over the brand of justice the court administers.

Despite the disparate application of the section 187 public policy exception in relationship to choice of law disputes, both jurisdictions enforced the premarital agreements at issue without regard to changed circumstances. Had the *Bonds* court applied the chosen law of Arizona, the agreement might have been invalidated. In contrast, had the Connecticut court in *Elgar* applied forum law and public policy, the agreement might have been invalidated. These cases evidence a preference to enforce premarital agreements without regard to chosen law or forum public policy.²⁴² Thus, the decisions from

239. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (2006).

240. *Id.* § 201 cmt. c.

241. *See, e.g.*, CAL. FAM. CODE §§ 1600 to 1617 (2004); CONN. GEN. STAT. §§ 46b-36a to 46b-36j (2004).

242. *See, e.g.*, Cory Adams, *Premarital Agreements*, 11 J. CONTEMP. LEGAL ISSUES 121, 123 (2000) ("These trends demand a new structure of rights and obligations concerning commitment. The law in most states has responded to these broad, societal developments with an increased willingness to enforce premarital agreements. Today, for example, many courts are willing to accept and enforce those premarital agreements concerning post-divorce obligations of spousal support that they had declared unenforceable in the past. The clear trend throughout the United States now favors, perhaps even encourages, premarital agreements.").

both jurisdictions are subject to an instrumental critique. Did each court craft its analysis to achieve the predetermined goal of enforcing the agreement at issue? If so, the public policy interests protected by procedural and substantive fairness rules are sacrificed to the judicial preference to enforce private contracts. Arguably, forum public policy, designed to protect the economically dependent spouse, was subverted by the decisions in both cases to advance party autonomy.

3. The wanting one-step: courts collapse validity and enforceability steps

Few jurisdictions have addressed the choice of law issue in relationship to premarital agreements as critically as have the California and Connecticut courts. In other states in which the issue has been raised, courts have further collapsed the analysis into one inquiry: whether either of the section 187(2) exceptions exists.²⁴³

In some instances, a choice of law provision designating a foreign state may be enforced as a matter of course without considering the distinction between validity, enforceability or construction. For example in *Dardick v. Dardick*,²⁴⁴ the Missouri court enforced the California choice of law provision to construe and govern the agreement without examining the relative public policy interests of the two states.²⁴⁵ Likewise, in *Estate of Davis*,²⁴⁶ the Ohio Court of Appeals rejected the appellant's first argument that the state of Texas lacked a sufficient relationship to the parties and the dispute to apply Texas law to a premarital agreement action pending in Ohio. In response to the appellant's second argument that the agreement was invalid because it was procedurally and substantively unfair, the court applied Texas law to reject both arguments without even addressing the section 187(2)(b) public policy exception. Thus, some courts rely upon choice of law provi-

243. See *Nanini v. Nanini*, 802 P.2d 438, 441 (Ariz. Ct. App. 1990) (according to Arizona court applying Illinois law to uphold premarital agreement, choice of law clause will be enforceable so long as there is some nexus between the chosen law and the pending issue); *DeLorean v. DeLorean*, 511 A.2d 1257, 1261-62, 1264 (N.J. Super. 1986) (New Jersey court applies California choice of law provision and upholds agreement); *Carr v. Kupfer*, 296 S.E.2d 560, 561 (Ga. 1982) (Georgia court enforces Maryland choice of law to determine enforceability of agreement).

244. *Dardick v. Dardick*, 948 S.W.2d 268 (Mo. Ct. App. 1997) (court fails to address argument that, under the Cal. P.A.A., a choice of law provision embraces only matters of construction, while validity is determined under forum law).

245. *Id.* The decision to apply California validity standards is somewhat ironic given the California Court of Appeals' subsequent decision that forum law should apply. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 789-90 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

246. *In re Estate of Davis*, No. 98-A-0085, 1999 WL 1313614, *3 (Ohio Ct. App. Dec. 3, 1999).

sions to resolve all issues related to premarital agreements without even a cursory review of the public policy implications.²⁴⁷

Some courts are slightly more discerning; however, the analysis remains unsatisfactory. For example, a District of Columbia²⁴⁸ court distinguished between the question of validity and enforceability by recognizing that a premarital agreement designating Florida law as controlling was valid under Florida law, but refused to enforce the agreement as a matter of District of Columbia public policy.²⁴⁹ The court collapsed the choice analysis into a single analytical observation that enforcing the agreement violated forum public policy without applying any modern conflict approach to determine the interest of each jurisdiction in the application of its laws.²⁵⁰

Although the foregoing cases were decided by courts in jurisdictions that had not adopted the UPAA at the time of the hearing, one case was decided by a court in a UPAA jurisdiction. Despite the UPAA commentary narrowly defining the scope of a choice of law provision to issues related to construction,²⁵¹ the North Carolina Court of Appeals in *Franzen v. Franzen*,²⁵² enforced an Ohio choice of law provision contained in a premarital agreement noting, “choice of law provisions are valid and must be given effect.”²⁵³ Cursory treatment of choice of law provisions contained in premarital agreements conflates into one analysis the separate concerns of validity, enforceability and construction, undermining the forum jurisdiction’s right to control the brand of justice it delivers.

In summary, there is little uniformity in the case law interpreting the scope, validity and enforceability of choice of law provisions contained in premarital agreements. Clearly, in states employing the Restatement (First), guidance is needed given the theoretical inability of parties to choose the law to govern their contracts.²⁵⁴ In Restatement (Second) jurisdictions, there is a broad array of approaches. California courts interpret the choice of law provisions in premarital agreements to apply only to questions of construction.²⁵⁵ Connecticut courts recognize the ability of parties to identify the law that will determine the validity of the agreement and do not engage in a robust analysis of whether application of the foreign law offends Connecticut public policy.

247. See *id.* at *4. Likewise, in *Shifano v. Shifano*, 471 A.2d 839, 843 (Pa. Super. 1984), the Pennsylvania Superior Court upheld a choice of law provision in the parties’ separation agreement designating Ohio law as controlling and applied Ohio law, not Pennsylvania law, to determine whether the alimony provision could be modified.

248. The District of Columbia follows a “Center of Gravity” approach. See Smith, *supra* note 40, at 1172.

249. *Norris v. Norris*, 419 A.2d 982 (D.C. 1980).

250. *Id.* at 984.

251. See Proceedings, *supra* note 121, at 40.

252. 520 S.E.2d 74 (N.C. Ct. App. 1999).

253. *Id.* at 75 (citing *Land Co. v. Byrd*, 261 S.E.2d 655, 656 (N.C. 1980)).

254. See *supra* Part III.A.

255. See *supra* note 213 and accompanying text.

The remaining Restatement (Second) jurisdictions do not even apply section 187 to determine the validity of the choice of law provisions. Rather, these courts presume they are valid and encompass all issues related to construction, validity and enforceability. Clearly, more careful analysis of the potentially relevant laws and policies implicated in premarital agreement litigation is required to insure just and consistent results.

C. The Severability Swing: Forum Law Applied to Partially Invalidate Premarital Agreements Containing Support Waivers

The forum's interest in protecting the financially dependent spouse in divorce proceedings often results in an order of spousal support before divorce and alimony following dissolution. Public policy concerns are raised when a spouse attempts to limit or eliminate support obligations via premarital agreements. For example, Florida, a *lex loci* jurisdiction, enforces premarital agreements based on the law of the place of contracting, subject to public policy limitations.²⁵⁶ Florida precedent relies upon substantial public policy interests to prohibit the limitation or waiver of spousal support following separation and prior to divorce in all instances.²⁵⁷ Rather, support is determined according to Florida law until dissolution. The prohibition treats the state as an interested party to the marital relationship and furthers the state's interest in protecting the financially dependent spouse until divorce. Thus, waivers of support prior to divorce are severed from otherwise valid premarital agreements.²⁵⁸ The offending provision is deemed unenforceable and forum law is substituted.²⁵⁹

Similarly, South Dakota rejects the parties' ability to waive support or alimony by premarital agreement. Although South Dakota adopted portions of the UPAA, the legislature excluded the provisions permitting limitation or waiver of spousal support and alimony.²⁶⁰ Thus, support and alimony rights are deemed outside of the scope of premarital agreements under South Dakota law. Recently, the South Dakota Supreme Court severed the portion of a premarital agreement waiving support and alimony from an otherwise enforceable premarital agreement.²⁶¹

In the remaining jurisdictions adhering to the support provisions of the UPAA, waivers related to support and alimony are invalidated at the time of

256. Michael S. Finch, *Choice of Law & Property*, 26 STETSON L. REV. 257, 289 (1996). Finch also notes that choice of law problems may arise when a party argues that choice rules related to property, not contract, should be applied to determine disputes related to real property. *Id.*

257. *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972).

258. *See, e.g., Fernandez v. Fernandez*, 710 So. 2d 223, 224-25 (Fla. Dist. Ct. App. 1998).

259. *See, e.g., Lashkajani v. Lashkajani*, 911 So. 2d 1154, 1157-58 (Fla. 2005).

260. S.D. CODIFIED LAWS §§ 25-2-16 to 25-2-26 (2006).

261. *Sanford v. Sanford*, 694 N.W.2d 283, 293-94 (S.D. 2005).

divorce if enforcement would render the financially dependent spouse a ward of the forum state.²⁶² The financial impact of enforcing the support and alimony provisions of a premarital agreement must be analyzed under forum law by the court before the enforceability of such a waiver provision can be determined.²⁶³ Thus, under the UPAA, the enforceability of support provisions must be determined by forum law without regard to chosen law.

In summary, the California court has interpreted the Cal. P.A.A. choice of law provision to preserve the forum state's authority to decide questions of contract validity without regard to the chosen law.²⁶⁴ Connecticut, in contrast, construes the Con. P.A.A. to require the court to apply chosen law to all issues related to validity and construction.²⁶⁵ Connecticut employs a crabbed interpretation of the section 187(b) public policy exception.²⁶⁶ The least sophisticated analytical approach enforces choice provisions contained in premarital agreements based upon a cursory finding of substantial similarity between the forum law and the chosen law.²⁶⁷ In several jurisdictions, without regard to the chosen law, support and alimony waivers are deemed invalid on public policy grounds and severed from the agreement.²⁶⁸ Given these distinct and varied approaches to analyzing premarital agreements, courts, counsel and clients are in need of guidance. In the interests of promoting predictability and uniformity in litigation related to premarital agreements, the forum should apply the law of the jurisdiction with the materially greatest interest in the outcome to questions of validity and construction, subject to forum public policy concerns.

VI. CROSS-BORDER CONSTRUCTION QUANDARIES

Even when an agreement is determined to be enforceable, legal questions related to interpretation raise a variety of substantive legal issues.²⁶⁹ Section 187(1) of the Restatement (Second) fails to recognize this quandary by affording parties the right to designate the law to construe and interpret the agreement without recognizing that policy concerns might also prompt courts

262. UNIFORM PREMARITAL AGREEMENT ACT § 6 (2006).

263. *Id.*

264. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 791 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

265. *Elgar v. Elgar*, 679 A.2d 937, 942 (Conn. 1996).

266. *Id.* at 943-44.

267. *Rathjen v. Rathjen*, No. 05-93-00846-CV, 1995 WL 379322, *8 (Tex. App. May 30, 1995).

268. *See, e.g.*, UNIF. PREMARITAL AGREEMENT ACT § 11 (2006).

269. Moreover, the specter of such enforcement quagmires might lead a practitioner to recommend a complete waiver agreement, eliminating questions of applicable law and implementation issues and reducing the threat of a malpractice claim, while arguably failing to fashion the agreement a client originally envisions, thus raising a different set of ethical concerns.

to disregard a choice provision, even if limited narrowly to matters of interpretation. The wide variety of rules relating to the identification, valuation, and distribution of marital property creates confusion in enforcing the substantive terms of an agreement, particularly with respect to identifying marital property and construing the effect of broad waiver provisions with respect to specific forum law regarding equitable distribution, transmutation, homestead²⁷⁰ and retirement benefits.

Particularly vexing complications related to premarital agreements and choice of law arise when the agreement is valid, but requires the forum court to implement an agreement crafted with foreign law in mind. For example, should a court define the character of property acquired during the marriage, as marital property or community property, according to forum or chosen law?

Following the lead of the *Bonds* court,²⁷¹ in 2005 the Oregon Court of Appeals narrowly interpreted a California choice of law clause in a premarital agreement to apply to construction issues only.²⁷² The court rejected the argument that the provision required the Oregon court to apply California substantive divorce law to divide the property acquired by the parties during the marriage.²⁷³ This issue was particularly important to the husband who was seeking a credit of \$453,845 for contributions he made from his separate assets to the acquisition of marital assets. Although California law permitted such tracing and credits in relationship to community property, Oregon law did not recognize it in relationship to marital property.²⁷⁴ Although the husband prevailed at the trial court level, the appellate court reversed and remanded with instructions for the trial court to apply Oregon substantive law and divide the marital assets accordingly.²⁷⁵

In contrast to the Oregon Court of Appeals approach, the Vermont Supreme Court affirmed the trial court's decision to invalidate a premarital agreement executed in California in 1981.²⁷⁶ In *Gamache*, the parties separated in 1992 and the wife relocated to Vermont.²⁷⁷ Although Vermont is a Restatement (Second) jurisdiction, neither party raised the applicability of Vermont law to determine the validity or enforceability of the agreement and the court did not raise either issue *sua sponte*. In a footnote, the court approved the application of California substantive law to characterize the prop-

270. "Constitutional homestead" is a right conferred on the head of household by a state constitution exempting the home, outbuildings and land used as a residence from forced sale. BLACK'S LAW DICTIONARY 751 (8th ed. 2004).

271. *Bonds v. Bonds (In re Marriage of Bonds)*, 83 Cal. Rptr. 2d 783, 792 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

272. *Proctor v. Mavis*, 125 P.3d 801, 803 (Or. App. 2005).

273. *Id.* at 803.

274. *Id.*

275. *Id.* at 803-04.

276. *See Gamache v. Smurro*, 904 A.2d 91 (Vt. 2006).

277. *Id.* at 93.

erty in dispute as community property.²⁷⁸ The agreement at issue protected the husband's premarital interest in one piece of California realty.²⁷⁹ Instead of reaching the issue of the validity of the agreement as the trial court had, the court ruled that the husband had modified the agreement through his subsequent conduct by placing title to the property in joint names.²⁸⁰ Thus, the California property was properly subject to division between the parties.

With respect to retirement rights, in *Kinkle v. Kinkle*, the Ohio Supreme Court addressed the question of whether a premarital agreement waiver of an individual retirement account interest superseded the beneficiary designation clause in an individual retirement account contract.²⁸¹ The IRA was created before the premarital agreement was executed.²⁸² If the issue was resolved using the IRA choice of law, Massachusetts, arguably the beneficiary designation would control. If the issue was resolved under forum law, the waiver in the premarital agreement would control.²⁸³ The court resolved the conflict by applying Ohio law and ruling that the premarital agreement property waiver, executed after the IRA contract was created, was valid.²⁸⁴ Thus, the after-executed premarital agreement waiver was valid and enforceable.²⁸⁵

With respect to homestead rights, the Florida District Court of Appeals held that, despite the validity of a premarital agreement under Puerto Rico law, the waiver of Florida homestead rights violated Florida fundamental public policy and was, therefore, unenforceable.²⁸⁶ The court justified its departure from the rules of comity to protect a Florida citizen's paramount right to homestead protection set forth in the Florida Constitution.²⁸⁷ This right cannot be waived by contract. Because the surviving spouse lived from time to time in the Plantation, Florida house, the high court remanded the matter to the trial court to determine whether the Florida real property qualified for homestead protection.²⁸⁸

The foregoing cases illustrate the construction quandaries courts face when enforcing foreign premarital agreements. Given the relatively exclusive authority of the states to regulate matters related to marriage and divorce, there are many state-specific rules and concepts that differ across state lines. States have different definitions of marital or community property, different

278. *Id.* at 96 n.2.

279. *Id.* at 93.

280. *Id.* at 98-99.

281. 699 N.E.2d 41 (Ohio 1998).

282. *Id.* at 42.

283. *Id.* at 43.

284. *Id.* at 43-44.

285. *Id.* at 44. *But see* Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992) (holding antenuptial waiver language alone insufficient to waive ERISA rights).

286. Nicole v. Nicole-Sauri (*In re* Estate of Nicole Santos), 648 So. 2d 277, 281-83 (Fla. Dist. Ct. App. 1995).

287. *Id.* at 282.

288. *Id.*

tracing and transmutation rules, different distribution factors and even different rules relating to the marital residence or homestead. Each state has devised a statutory scheme to further state policy and goals. Thus, not only do the substantive rules for enforcing premarital agreements and conflicts rules differ from state to state, the underlying substantive rights and obligations arising out of marriage and divorce also differ. In sum, a reasoned and uniform approach is required to balance the competing interests of the parties and the state.

VII. THE PRENUP THREE-STEP: A TRULY UNIFORM APPROACH

The question remains: how should a court treat an express choice of law provision in a premarital agreement? Does it control the law to determine construction and formation issues only, or does it also control the applicable validity and enforceability standards? Given the foregoing case law, each state answers this question according to its existing idiosyncratic interpretation of the law. Courts analyzing premarital agreements with choice of law provisions must balance the competing interests of the individual and the state according to the applicable statutory and common law rules.

With respect to conflict of law concerns, states typically follow the Restatement (First) or the Restatement (Second). The balance achieved in the Restatement (First) rule permits parties to contract freely. However, it prevents them from identifying the procedural or substantive rules that will apply because it defers always to the place of contracting, unless to do so would violate the forum state's own fundamental public policy.²⁸⁹ Arguably, the Restatement (First) approach is unsatisfactory because it applies the law of the place of execution, a jurisdiction typically lacking any interest in the economic outcome of premarital agreement litigation if the parties have relocated to another state.

Under the Restatement (Second), a balance between the individual's rights and the state's interests is reached by permitting parties to contract freely as to rules of construction, but preserving the forum's right to decide matters of procedural and substantive fairness under forum law. The Restatement (Second) approach is likewise unsatisfactory because it requires a multi-faceted and unwieldy analysis:

1. Does the choice embrace matters typically outside of the parties' right to contract?;

289. Harold P. Sout, *Conflict of Laws in Florida: The Desirability of Extending the Restatement Approach to Cases in Contract*, 21 NOVA L. REV. 777, 778 (1997) (Sout comments, "Real dissatisfaction with territorial principles began to manifest itself in the first third of this century. Against a backdrop of monumental change in the larger society, territoriality and the results it dictated grew increasingly unpalatable to judges striving to do justice in individual cases and no longer overawed by notions of sovereignty.")

2. If so, does the jurisdiction of the chosen law have the minimum contacts necessary to support application of its law?;
3. If so, does application of the chosen law violate a fundamental public policy of the jurisdiction of the otherwise applicable law?; and
4. Does the jurisdiction of the otherwise applicable law have a materially greater interest in the application of its own law than does the jurisdiction of the chosen law?

This cumbersome analytical process has not lead to uniformity or predictability in judicial analysis of the premarital agreements. This is attributable to the discretion built into this approach. By deferring to the forum to determine the jurisdiction with the materially greatest interest in the outcome of the litigation and requiring application of this law to decide matters of fundamental public policy, the approach deprives the forum of its right to control the brand of justice it dispenses. Thus, this approach is often ignored by courts.

The balance achieved in the UPAA between private ordering and public control limits party authority to define the law applicable to matters of construction, excluding by omission questions related to validity and enforceability. Although comments to the UPAA demonstrate that the drafters intended forum law to control only matters of validity,²⁹⁰ only California interprets the choice of law provision as narrowly as intended by the drafters.²⁹¹ Additionally, even construction issues can raise fundamental public policy interests.

A. A Unified Approach Would Assist Lawyers in Advising Clients and Courts in Analyzing Agreements

Given the *sui generis* nature of premarital agreements and the creation of marital property rights through legislation, each state's unique premarital agreement law reflects its own substantial and fundamental public policy, thus triggering in every instance a potential public policy exception to a choice of law provision. One way to view premarital agreement standards is to categorize the entire body of law as procedural, eliminating any conflict analysis, deferring always to the law of the forum in which enforcement is sought.

Another alternative is to interpret the question of which law applies as creating a false conflict because the forum, as the last marital domicile, is typically the jurisdiction with the most significant relationship to the parties

290. Proceedings, *supra* note 121.

291. Bonds v. Bonds (*In re Marriage of Bonds*), 83 Cal. Rptr. 2d 783, 791, 792 n.1 (Cal. Ct. App. 1999), *rev'd*, 5 P.3d 815 (Cal. 2000).

and the divorce matter. Is presumptive deference to the forum law in relationship to premarital agreements justified? The best justification may be that the subject of the premarital agreement deals with family law matters where “the center of gravity” . . . may be found at the (last) matrimonial domicile.”²⁹² Thus, the UPAA reflects deference to the law with the closest connection to the parties, the center of gravity, and the last marital domicile, and assumes it is also the forum. The central weakness with this approach is that it fails to account for the possibility that the forum is not the last marital domicile or that the “Economically Dependent Spouse’s Domicile” (EDSD) is no longer the last marital domicile.

The California approach in *Bonds*²⁹³ adopts the forum law default rule. This rule, although facially attractive, works best when the forum is the last marital domicile, and both parties continue to reside in the state. However, in instances in which the forum is not also the domicile of the economically dependent spouse, the de facto application of forum law is illogical. The validity of a premarital agreement usually determines the economically dependent spouse’s right to a share of property acquired during the marriage and support. Because the economic burden of the dependent spouse will fall upon the taxpayers of that spouse’s domicile at the time of divorce, it is logical that waivers in the agreement should be analyzed according to the law of the state in which the needy spouse is domiciled.²⁹⁴ While a last marital domicile rule will typically reach this result because the economically dependent spouse is less likely to have the funds to relocate, the classification is too blunt an instrument in divorce cases in which the individual economic situation of both parties is determined as part of the dissolution proceedings.²⁹⁵ Therefore, courts should defer to the law of the EDSD rule.

An EDSD rule adheres to the policy considerations of Restatement (Second) section 6. It is policy driven and advances the law of the most interested

292. SCOLES ET AL, *supra* note 62, at 993-94. This approach would result in the application of forum law without establishing that the chosen law or otherwise applicable law violates forum public policy. This approach simplifies the analysis, promotes settlement and reduces appeals. See, e.g., *Ducharme v. Ducharme*, 872 S.W.2d 392 (Ark. 1994) (trial court’s application of forum public policy to invalidate premarital agreement reversed on appeal).

293. *Id.*

294. Typically, the last marital domicile retains subject matter jurisdiction over the divorce-related economic claims and personal jurisdiction over the parties due to long arm jurisdiction. See WEINTRAUB, *supra* note 60, at 312. The last marital domicile approach, while easily implemented, is unsatisfactory from a choice perspective because it does not require the court to apply the law and advance the policy of the jurisdiction where the economically dependent spouse is domiciled if such jurisdiction is not also the last marital domicile.

295. See *Orr v. Orr*, 440 U.S. 268, 281 (1979) (the legislature may not rely upon the gender classification of husband as a proxy for the economically independent spouse when the finances of the parties are established as part of the evidentiary process).

jurisdiction. At the same time it respects forum autonomy. It promotes certainty and predictability and is easy to apply. It does not frustrate individual expectations because such expectations should be realistically lowered given the state's active role in approving property and support agreements between divorcing spouses.

An EDSD analytical approach is particularly attractive because it provides clear rules in cross-border enforcement of premarital agreements. Thus, courts faced with disputes regarding a premarital agreement, without regard to the chosen law, if any, should follow a revised three-step analysis:

1. Identify the domicile of the economically dependent spouse at the time of dissolution;²⁹⁶
2. Determine the validity and enforceability of the agreement by applying the law of the EDSD; and
3. If the agreement is both valid and enforceable under the law of the EDSD, enforce the agreement subject to forum public policy constraints.²⁹⁷

The approach described above renders mandatory the law of the EDSD as to the construction and validity of the premarital agreement, without regard to the chosen law. It reflects a significant relationship approach because

296. This proposal recognizes forum law would apply to all questions except the validity and interpretation of a premarital agreement. These questions would be determined not by the chosen law of the agreement, but by the law of the domicile of the economically dependent spouse. This proposal advances the law of the jurisdiction with the materially greatest interest in the issue. The court should apply the law of the economically dependent spouse's domicile to decide the validity and enforceability of the agreement. The only exception to this rule is that reflected in the Restatement (Second) section 187 public policy exception. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187 (2006).

297. This prong reflects the Restatement (Second) section 187 approach in determining whether a fundamental public policy would be compromised if the agreement were enforced. Each of the three steps outlined above is vital because it can, independently, impact the outcome of the case. It is particularly important to distinguish between step two and three to maintain the legal distinction between grounds of invalidity and grounds for unenforceability. The danger of combining these steps leaves counsel and litigants without a clear understanding of the reasons for rejecting the agreement. For example, in *Pro Edge, L.P. v. Gue*, 374 F. Supp. 2d 711, 737 (N.D. Iowa 2005), the court, after identifying Iowa as the controlling law to determine the validity of the agreement, moved immediately to a section 187 public policy exception analysis, collapsing the validity and enforceability issues.

premarital agreements are not performed until the time of dissolution,²⁹⁸ rendering the EDSD the most interested jurisdiction.²⁹⁹

The concept of mandatory law has been recognized in Europe and is embodied in the Rome Convention.³⁰⁰ A mandatory rule is embodied in legislation that cannot be varied by a choice of law rule, without the need to examine the public policy exception that might also trump the choice provision.³⁰¹ In 2001, the drafters of the UCC approved a revision that incorporated a mandatory rule into the code to protect consumers. Section 1-301, dealing with consumer contracts, provides that the choice of law provision in the contract “may not deprive the consumer of the protection of any rule of law . . . which both is protective of consumers and may not be varied by agreement.”³⁰²

Maintaining the EDSD rule values the public’s interest over that of the individual in all instances. This EDSD rule creates a presumption that the forum law at the time of divorce will control.³⁰³ The EDSD rule promotes the sanctity of marriage, treats as important and fundamental the support rights and obligations arising out of marriage and provides economic security to the divorcing spouses and their minor children, if any.³⁰⁴ It also reflects

298. *Rivers v. Rivers*, 21 S.W.3d 117, 122 (Mo. Ct. App. 2000) (place of performance of premarital agreement is place where parties are dissolving their marriage).

299. This accords with the view that the center of gravity in premarital agreement litigation is located where the economically dependent spouse resides. *SCOLES ET AL.*, *supra* note 62, at 994. This rule is also in harmony with the better law approach and the governmental interests analysis. *Id.* at 993.

300. Rome Convention on the Law Applicable to Contractual Obligations, Art. 3(3) and 7(1) (2), Jan. 26, 1998.

301. *Id.* at cmt. 6.

302. U.C.C. § 1-301(e)(2) (2006).

303. While critics might argue that the forum law approach undermines the interests of uniformity and predictability associated with choice of law provisions, the various escape devices embodied in characterizing questions as procedural or matters of fundamental public policy already compromise the certainty afforded by choice of law provisions. *See, e.g.*, William S. Dodge, *Extraterritoriality and Conflicts-of-Law Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 118 (1998). The forum law approach also rejects the application of foreign law when local law applies, thus promoting the application of local law, deemed by the legislature to be “desirable and necessary.” *Id.* at 150.

304. *See* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2390 (1994) (“By contrast, the situation that each spouse faces at divorce after a one-year marriage is largely the product of choices and circumstances that existed before marriage. The transition into the interdependence of a long marriage occurs gradually. As a result, ‘the share of the loss attributable to the spouses’ joint undertaking is proportional to the marital duration,’ and at some point should be shared between them.”) (quoting A.L.I., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 324 (Preliminary Draft No. 4) (1993)).

deference to the jurisdiction with the materially greatest interest in the outcome of the economic issues related to divorce.³⁰⁵

The proposed shift from party autonomy to state autonomy furthers fundamental public policies that provide the basis of each jurisdiction's unique marriage and divorce law. While the laws in place differ, the policies underlying them are quite similar. The legislative intent underlying dissolution law is designed to achieve economic fairness, to preserve the relationships between parents and children and to reduce the animosity that often accompanies dissolution. By limiting the propertied spouse's ability to avoid the economic safety nets in place to protect the economically dependent spouse, the EDSD rule advances the policies driving dissolution law.

B. Practical Recommendations

One way to defer to the law of the EDSD is by legislative mandate. A statute mandating the EDSD rule could be implemented in conjunction with the existing premarital agreement law and made applicable on a prospective basis. The following provision captures the goal of the EDSD rule:

EDSD Law Controls Validity and Construction

Notwithstanding any provision to the contrary contained in a premarital agreement, the validity and construction of the agreement, raised in relationship to a marriage dissolution action, shall be determined according to the law of the Economically Dependent Spouse's Domicile ("EDSD") at the time the dissolution action is commenced.

If the agreement is valid under the EDSD law, then the forum shall enforce the agreement, subject only to its own fundamental public policy enforcement concerns.

The determination of which spouse is economically dependent shall be made as a matter of forum law based upon the circumstances existing at the time of dissolution.

305. Many of the same concerns that justify restrictive covenant laws also apply to parties negotiating a premarital agreement, particularly one that is the subject of a later challenge. There is often unequal bargaining power. This inequality can be economic, educational or can relate to business expertise. Separate representation does not cure the inequality because the weaker party to the agreement may sign it against counsel's advice. Often there is an unwillingness to negotiate and the agreement is presented on a take it or leave it basis, creating a contract of adhesion. For all of these reasons, the weaker party presented with a premarital agreement resembles the employee presented with a business contract. Both deserve the protection of mandatory law.

As Brilmayer noted, the logical application of abstract choice rules should subside to legislative will: "If the application of forum law furthers the actual preferences of the state, as chosen by the democratically elected decision-making bodies, then choice of law scholars should not get in the way."³⁰⁶ However, if the EDSD is not also the forum, then this approach demands application of foreign law, subject to forum public policy.

In addition to legislative reform, practitioners need to inform clients of the limited utility of choice of law provisions in premarital agreements. Practitioners should also consider including the following qualification of any choice of law provision contained in a premarital agreement:

Sample Contractual Choice of Law Provision

The parties identify the law of State A to determine any and all questions related to this agreement, including but not limited to the validity, enforceability and construction of this agreement.³⁰⁷

This choice of law clause was not the result of fraud, misrepresentation, duress or any other traditional defense to the validity and enforceability of a contract.³⁰⁸

The parties recognize that the foregoing choice of law provision may be deemed partially or entirely unenforceable as a matter of law or public policy due to the wide variety of special protections afforded to divorcing spouses according to the forum law applicable at the time of dissolution.³⁰⁹

The foregoing recommendations provide a template for legislative action and a qualified choice of law provision for premarital agreements to ensure that clients understand the uncertainty associated with choice of law provisions. The goal is to create a mandatory rule to require the forum court to apply the law of the EDSD, by deferring to the jurisdiction with the materially greatest interest in the outcome, subject to forum public policy limitations.

306. BRILMAYER, *supra* note 46, at 100.

307. This provision recognizes that the issues of validity and construction are separate from enforceability. *See supra* notes 191-96 and accompanying text.

308. This choice recognizes that any claim of invalidity must go directly to the choice of law provision according to section 187. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006).

309. This provision places clients on notice that the choice of law in premarital agreements may be deemed invalid as a matter of forum law and public policy if the parties subsequently relocate to another state or if the chosen law changes and is retroactively applied.

C. Criticisms Considered

Critics might suggest that by depriving parties of the right to determine the standard of validity, the utility of premarital agreements is entirely compromised. Arguably, agreements executed with the utmost good faith will satisfy the most exacting validity standards at the time enforcement is sought. Thus, agreements that are fair at execution are likely to remain enforceable at divorce.

This EDSD rule likely triggers the following additional concerns:

1. It denies the individual of the constitutionally protected right to contract freely;
2. It violates the due process clause designed to protect the defendant from application of a law that is arbitrary or unfair; and
3. It violates the Full Faith and Credit clause entitling cross-border contracts to legal recognition and enforcement.

Although each of these concerns is valid, each fails to outweigh the substantial interests that support the EDSD rule.

1. This EDSD rule preserves the individual's constitutionally protected right to contract freely

With respect to the individual's substantive due process right to contract, the individual's right has always been subject to legislative limits. Simply by requiring a contract to meet procedural and substantive minimum requirements under forum law, no constitutional right is deprived.³¹⁰ The freedom to marry remains uncompromised.³¹¹ The rights and obligations of marriage are conferred by the state; therefore, the premarital agreement rules, both procedural and substantive, are reasonable restrictions in furtherance of legitimate state interests.³¹² Some might argue that by negating choice of law freedoms to implement an EDSD rule, the state discourages premarital agreements.³¹³ Arguably, the potential benefits of a fairly crafted premarital agreement will outweigh the potential uncertainty of the controlling law, re-

310. The freedom to contract has always been subject to statutory and common law limitations. See, e.g., F. Eric Fryar, *Common-Law Due Process Rights in the Law of Contracts*, 66 TEX. L. REV. 1021, 1024-25 (1988).

311. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (legislation that does not substantially interfere with the fundamental right to marry need satisfy only rational basis scrutiny).

312. *Id.* at 388.

313. In fact, the inability to predetermine controlling law may result in agreements that are procedurally and substantively just.

sulting in the creation of procedurally and substantively fair agreements, in compliance with the most stringent rules.

Another related right to contract critique is that a party could manipulate the EDSD rule by relocating to a jurisdiction with premarital agreement rules designed to achieve an orchestrated result: either the validity or invalidity of the agreement. This form of unilateral divorce planning is difficult to escape, especially in the premarital agreement sphere. Under the existing contract choice of law regime, the choice provision is an express attempt to control validity and enforceability in the future without regard to the policy interests of the unknowable last marital domicile and EDSD.³¹⁴ Arguably, an orchestrated relocation under an EDSD rule simply changes the timing and form of the instrumental conduct.³¹⁵ At a minimum, if the EDSD is applied, the public policy interests of the most interested jurisdiction are furthered.

The instrumental impact of the forum law preference for the EDSD could result in provisions that satisfy not only procedural fairness requirements, but also substantive fairness requirements. Given the possibility that a married couple might move from a traditional contract state to a substantive fairness state under the last marital domicile rule, the uncertainty of the applicable standard arguably forces a fair provision. In fact, a likely outcome of this rule may be a race to the top.³¹⁶ Instead of drafting agreements containing complete waivers, the standard could provide a welcome incentive for propertied parties to negotiate agreements containing more limited waivers of marital rights. Such agreements are far more likely to satisfy a fair and reasonable examination at the time enforcement is sought.

2. The EDSD rule does not violate the Due Process Clause

With respect to the procedural due process argument, application of EDSD law is justified under the requisite significant contacts analysis.³¹⁷ This standard is explained in *Allstate Insurance Co. v. Hague*,³¹⁸ in which the Supreme Court upheld the Minnesota court's application of forum law to

314. The generally accepted test for domicile as physical presence with a settled intent to remain ferrets out those whose claimed domicile is fictitious.

315. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1696 (1990) (Suggesting that, "[w]ithin ethical constraints, forum shopping can serve the legal system's goal of remedying injury. To the extent that rights are insufficiently enforced and remedies none too easily available, forum shopping is one factor that can assist some plaintiffs, even while other social and legal factors favor defendants. Transcending the selective and formalistic aversion to forum shopping can enhance the possibility of pluralistic methods of remedying wrongs.").

316. The race metaphor is borrowed from the corporate debate regarding the creation of efficient laws in the corporate sphere. See, e.g., Michael Abramowicz, *Speeding up the Crawl to the Top*, 20 YALE J. ON REG. 139, 140 (2003).

317. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.11 (1981).

318. *Id.*

invalidate a provision in an insurance policy and to require the defendant to pay benefits to the surviving spouse. The case turned upon whether the limited contacts identified supported the application of Minnesota law.³¹⁹ The plurality and the dissenters agreed that application of Minnesota law was constitutional so long as it was “neither arbitrary nor fundamentally unfair.”³²⁰ The constitutional standard in place requires only that the law applied by the court has a reasonable relationship to the parties and the pending dispute.

Relocation during marriage and upon separation is clearly foreseeable and the application of the law of the most interested jurisdiction, that of the EDSD, is just and foreseeable. Relocation of the economically dependent spouse is a weighty contact that likely trumps the remaining contacts of the last marital domicile to the pending dissolution matter. This is particularly true if the dependent spouse is also the physical custodian of minor children. As the contacts with the economically dependent spouse’s domicile increase in number and weight, the argument that application of EDSD law violates Due Process falls away.³²¹ Application of EDSD law to decide the validity of a premarital agreement in relationship to the divorce makes elegant policy sense: application of the law of the most interested jurisdiction to determine property and support rights related to divorce.³²²

3. The EDSD rule does not violate the Full Faith and Credit Clause

With respect to the full faith and credit argument, the focus shifts from the individual’s expectations to those of the interested sister states. The EDSD rule recognizes that the law of more than one jurisdiction may apply and that the forum state has the discretion to identify the controlling law by analyzing the interests involved.³²³ If such an interest is asserted on behalf of the state in which the premarital agreement was executed, the forum state, also the last marital domicile, might properly apply EDSD law or forum law because of other more significant contacts.³²⁴

319. The contacts included the decedent spouse’s relocation from Wisconsin to Minnesota after the accident, the fact that decedent had formerly commuted from Wisconsin to Minnesota for work over a fifteen-year period and the defendant corporation’s business contacts in Minnesota. *Id.* at 320.

320. *Id.* See also *Clay v. Sun Ins. Office Ltd.*, 377 U.S. 179 (1964) (U.S. Supreme Court upheld application of Florida law by Florida court to invalidate an Illinois personal property insurance contract provision setting a limitations period of twelve months in which to bring claim when Florida permitted claims within five years of the loss and plaintiff was a Florida resident, who relocated from Illinois).

321. *Allstate Ins. Co.*, 449 U.S. at 313.

322. BRILMAYER, *supra* note 46, at 66 (“[S]hared domicile cases are not really multistate cases at all under Currie’s scheme, but rather purely local ones.”).

323. See SCOLES ET AL., *supra* note 62, at 162-64.

324. *Id.* at 165 (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003)).

The application of EDS law to determine the validity and construction of premarital agreements is justified because the EDS standards reflect the substantial public policy interests of the most interested state regarding spousal economic rights. Moreover, the asserted interests of the jurisdiction of the chosen law, often the place of execution and the place of the first marital domicile, may have lost all contact with the parties and the subject matter of the contract.³²⁵ Therefore, full faith and credit concerns in relationship to the EDS rule are allayed. In relationship to a choice between the last marital domicile law and the law of the EDS, the EDS's interest is stronger, given the potential burden to its social welfare programs. Thus, EDS promotes comity by requiring application of foreign law.

D. Implementing the Mandatory EDS Rule

The EDS approach could be implemented through common law interpretation of the existing state choice rules, in connection with the existing premarital agreement validity standards, by emphasizing the expectation of the EDS that its law controls questions of validity and construction, subject to the fundamental public policy concerns of the forum. This approach is in harmony with the Restatement (Second) approach in section 187.³²⁶

This approach could also be implemented by: 1) amending the UPAA; 2) encouraging legislative reform to prefer the law of the EDS; and 3) educating family law practitioners and judges regarding the treatment of choice of law provisions under applicable law.

The UPAA could be amended, thus triggering statutory amendments in UPAA states, requiring courts to apply forum law so long as the forum is also the last marital domicile and so long as both of the parties to the dissolution proceeding continue to reside in the jurisdiction. This approach accords with EDS approach proposed earlier in this article. If these conditions are satisfied, then forum law would apply to decide all legal issues related to the validity, enforceability and construction of a premarital agreement. To the extent neither party continued to reside in the jurisdiction of the last marital domicile, the court would be required to apply the law of the EDS.

Additionally, legislatures should consider amending the existing statutory and common law standards by adopting a mandatory rule that the law of the EDS apply to disputes regarding the validity and construction of premarital agreements, subject to the fundamental public policy concerns of the forum.

Finally, continuing legal education regarding the drafting and application of choice of law provisions in premarital agreements is necessary to en-

325. In cases in which the parties execute the agreement in one state and relocate to another, the jurisdiction of the chosen law may have little or no interest in the outcome of the litigation.

326. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (2006).

sure that agreement provisions and choice clauses are properly drawn by attorneys to reflect the strong public policy interest, at the time of divorce, enjoyed by the EDSD.

Clearly, there is a need for reform to introduce a uniform standard that protects the state's interest in achieving fair and just results following divorce and defines a more limited degree of personal autonomy in the realm of premarital agreements. The reform should be introduced through legislation implementing the EDSD rule. Additionally, the UPAA should be modified to reflect this important preference for the EDSD. Thus, jurisdictions seeking guidance in adopting or improving their premarital agreement law will benefit from enacting a choice of law provision that embodies a uniform approach.

VIII. CONCLUSION

The unique combination of procedural and substantive fairness protections in premarital agreement law reflects each state's independent view of the appropriate balance between individual autonomy and state oversight of premarital agreements.³²⁷ Given the limited scope of the UPAA choice of law provision, one might predict that the UPAA states following the Restatement (First) would totally ignore choice provisions as outside the scope of a premarital agreement. In UPAA jurisdictions following the Restatement (Second) choice provisions would be enforced as to construction issues only. These predictions fall short. Cases interpreting choice of law provisions in premarital agreements are erratic. Some jurisdictions apply the chosen law to decide matters of validity and construction. Others apply the chosen law to matters of construction only, as required under the UPAA. In all jurisdictions, premarital agreements remain subject to the forum public policy exceptions.

Surprisingly, the narrow scope of the UPAA has been addressed in only one case. The *Bonds* decision highlights the legal distinction between questions of validity and contractual construction. Therefore, courts and legislators must be aware of the important distinctions between construction, validity and enforcement standards. The UPAA choice provision encompasses the first issue, but not the second and third. Given the importance of these distinctions, a uniform approach is required. Based upon the fundamental policies underlying the divorce law of each jurisdiction, the forum should, in all cases, apply the law of the jurisdiction with the materially greatest interest in the issues related to validity and construction, subject always to the unique public policy concerns of the forum, embodied in its statutory and common law standards of enforceability and in relationship to the overall context of

327. This recommendation is based upon the principle that validity should be determined according to the law of the jurisdiction with a materially greater interest in the outcome, while enforceability decisions should be made according to the fundamental public policy of the forum. *See supra* Part VI.A.

the divorce. An EDSO choice of law rule achieves these goals. It provides certainty, ensures the policy of the most interested forum is furthered and promotes fair and reasonable agreements.